Supreme Court, U.S.
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No. 991042 DEC 14 1999

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In the
**SUPREME COURT of the UNITED STATES**

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Robin and Karen Zahran

*Petitioners,*

v.

GERALD G. SHCMIDT, JR. individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,

*Respondents.*

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*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

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# PEITITION FOR A WRIT OF CERTIORARI

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156 pp

## QUESTIONS PRESENTED FOR REVIEW

1.. Whether Zahrans' Constitutional right to a jury trial pursuant to the 7th Amendment were discarded by the courts below through striking of Zahrans' jury demand.

2. Whether the courts below defected from this basic Court's rulings and guidelines on expert's

3. Whether the lower courts defected from their constitutional authority in overruling the State of Wisconsin Statutes and Wisconsin Supreme Court rulings referencing Wisconsin Insurance Statutes

4. Whether the courts below defected from the basic and normal course of judicial proceedings resulting in the confiscation of petitioners' constitutional rights of equal protection pursuant to the 14th Amendment and violation of their rights to due process pursuant to the 5th and 14th Amendment of the constitution

5. Defendant, Attorney Kmiec's alleged amended contract

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## STATEMENT OF FACTS
## HISTORY AND BACKGROUND

Robin and Karen Zahran are owners of a dairy farm which was insured by Frankenmuth Insurance Company of Michigan. On May 24, 1989, a tornado struck the farm causing severe property damage. Frankenmuth adjusters inspected and evaluated the damage. On July 25, a payment of $25,000 was made, and on August 7, 1989 additional various payments for different covered items in the amount of $136,687.78 were paid to Zahrans and the mortgagees as final payment of the assessed damages, absence reliance on proofs of loss submitted by Zahrans.

Frankenmuth rejected Zahran's proofs of loss as unverified and made further inspections resulting in further payments in October and November. (Appended p.30-36) Frankenmuth refused Zahrans request to repair the buildings (Appended p.37 and 38-41)

In January, 1990 and following Frankenmuth's delays, Zahrans retained Attorney Fitzsimmons to commence litigation in the U.S. District Court for the Northern District of Illinois for breach of contract, bad faith, and violation of Illinois statutes. Frankenmuth filed an answer, affirmative defenses and a counterclaim claiming all losses were paid in full and that Frankenmuth relied upon misrepresentations by Zahrans in making their payments and that Zahrans committed fraud with intent to deceive. The complaint was transferred to the Eastern District of Wisconsin under case number 90 C 337. On March 10, 1990, Frankenmuth's agents and attorney visited the farm for further assessment. They visited one of Zahrans' previous disgruntled employees who resided at one of the dwellings. Eight days later, that house went up in flames. Frankenmuth immediately inferred arson by Robin Zahran and later at the trial throughout the tornado litigation.

After the trial and eviction, the ex-employee (occupant of that house) admitted that the fire was accidentally caused by him.

On July 8, 1990, another fire occurred at the farm damaging some of the farm buildings previously damaged by the tornado and already claimed by Zahrans. Zahrans retained Attorney Schmidt of Milwaukee for representation, pursuant to a specific written agreement upon the complaint transfer to Milwaukee from Chicago.

Schmidt was retained to pursue Zahrans' claims caused by the fires and the tornado. He submitted a proof of loss on Aug. 28, 1990, pursuant to the fire by using estimates dated Sept. 20, 1989 made pursuant to the tornado assessments a year earlier without Zahrans knowledge. He pursued no discovery despite pending discovery deadlines to be completed by December 15, 1990, nor did he amend the pleadings of which some contained erroneous allegations, nor did he respond to Frankenmuth's allegations of misrepresentations.

Attorney Burrell substituted for Schmidt pursuant to a written contract. He was to pursue and investigate the relationships between Frankenmuth agents and the fires among other duties. Burrell discovered early on through his contacts with Wis. Dept. of Criminal investigations of a conspiracy by Frankenmuth and its adjusters against Zahrans to deprive Zahrans of their insurance claims proceeds through allegations of arson by Robin Zahran.

Burrell never pursued, through discovery, the issues of misrepresentation alleged by Frankenmuth, and failed to pursue Frankenmuth's concealment of documents in discovery, nor honored his contract and commitments to investigate all evidence that may have lead to who ever was responsible for the fires, and their relationships to Frankenmuth's allegations of fraud.

Burrell adopted the unwritten and undeclared position that Frankenmuth payments, after the denial of Zahrans' proofs of loss, estopped Frankenmuth from its ability to cancel coverage or void the policy even if their allegations were true, and that Zahrans should be able to use that legal defense at trial; reasoning that Frankenmuth's payments estopped them from a later declaration that the claim was invalid or that the policy

was void and that the term "an insured," refers to the individual insured under Wisconsin Law vs. "any insured", which would apply to all insureds and that Zahrans were separate insureds pursuant to the specific provisions of the policy. His reasoning was that Frankenmuth did not allege or indicate at any time that Zahrans were engaged in misrepresentations or fraud before Zahrans' filed their lawsuit.

Burrell did not object to Frankenmuth amending their affirmative defenses and counterclaim by incorporating the proof of loss dated Aug. 28, 1990, filed by attorney Schmidt, which the court allowed absent showing of any objection by Burrell.

Attorney Kmiec substituted for Burrell as an expert on insurance bad faith matters. He wasn't aware that a third proof of loss was filed by Schmidt in the fire claim. He never asked any of Frankenmuth's witnesses nor solicited any evidence relating to Frankenmuth allegations of misrepresentations or fraud committed by Zahrans and never preserved the issue of estoppel, reliance or Zahran's policy defenses on record because he never thought they were related to the issues of the disputes.

In the original trial, Kmiec attempted to submit new jury instructions and verdict form after the jury were deliberating, of which Judge Curran denied as too late and were waived. Nor was Judge Curran able to understand how Kmiec could present arguments to the jury, carry on a trail knowing that the issue of reliance was not in the jury instructions or the special verdict form and not object to it prior to the jury deliberations. Judge Curran commented that he can agree that there wasn't any evidence as to the misrepresentation or fraud allegations but that he was not going to recall the jury and give new instructions or a new verdict. ('wishing that the jury will correct their mistakes')

Kmiec did not file an amended reply to Frankenmuth's counterclaim and failed to request the court to instruct the jury that Frankenmuth had the obligation to prove reliance on Zahrans' misrepresentations with intent to deceive to find fraud,

or misrepresentation to defeat Zahrans' claims as was plead by Frankenmuth in its counterclaim and affirmative defenses. Nor did Kmiec advise Zahrans that they should hire a separate lawyer for representation, nor did he submit jury instructions on the innocent insured rule. He knew that the expert he retained to assess the damage submitted erroneous report at trial without either of Zahrans' knowledge or inspection.

Throughout the litigation, Kmiec did not seek court permission to amend pleadings, nor attempted to prove Zahrans' affirmative defenses plead by Burrell with the facts available, and never considered reliance, estoppel or innocent insured arguments and defenses as part of the issues or defenses, nor did Kmiec object to the interjecting of the fire losses by Frankenmuth in the tornado trial through opening and closing arguments and other inferences. Appended, p.26-29

Zahran directed his attorney to inform Frankenmuth, through his statement under oath and deposition, that he did not want nor expected to be paid twice for the same losses caused by the fire and tornado. The attorneys failed to act or plead Zahrans' contentions. Appended p.19-25

Frankenmuth made a payment of $99,995 as their assessment of the fire loss and rejected the proof of loss submitted by Attorney Schmidt and immediately moved the court to amend their pleadings, in the tornado litigation by alleging the additional misrepresentation and fraud by Zahrans through the additional filing of a proof of loss in the fire claim.

Attorney Burrell was under the impression that he settled the contract dispute claims with Frankenmuth, leaving the bad faith claim for Kmiec, as the expert to prosecute. .Appended p.111-113

In the original trial and in its opening statement to the attention of the jury, Frankenmuth claimed Robin Zahran misrepresented and committed fraud by claiming damage twice, once as a result of the tornado, and once as a result of the fire, for the same loss. Appended p.26-29.

At trial, Kmiec made no motion in limini referencing the fires nor objections, nor any motion for mistrial was ever

made. No defense to Frankenmuth's allegations were uttered, nor was any attempt to elicit testimony on the alleged misrepresentations made, nor did he attempt to defend against such allegations, nor was there one single question as to what specifically either of Zahrans misrepresented as to what fraud was committed by them. There was only Frankenmuth's attorney's opening and closing arguments without objections by Kmiec or testimony to contradict.

None of Zahrans' attorneys, (all of whom displayed themselves as experts on insurance matters) forwarded any pleadings or defenses based on the clear policy language of reliance as a necessary element to void the policy coverage, nor was Wisconsin statue or court case citations cited pursuant to Wisc. law as a defense, nor did Zahrans' attorneys attempt to dispute or rebut or defend against Frankenmuth's contentions pursuant to Wis. Law. Nor was there any pleadings pursuant Wisconsin Statute 631.11 (1)(b) Appended p. 17-18

No pleadings of either judicial or promissory estoppel pursuant to the record was made. No discovery on the issues of misrepresentation allegations, nor correcting of pleadings, nor proper cross examination of witnesses on false statements and testimonies given earlier in depositions which conflicted with Frankenmuth's witnesses trial testimony was brought up.

The jury, in lieu of all the above, returned a verdict that Zahrans violated the policy provision relating to misrepresentation. No one knows or will ever know what specific misrepresentations, concealment or fraud were made by either of Zahrans or what did the jury determine in that reference or how were these representations related to Zahrans' claims or the policy provisions or to the allegations of misrepresentations alleged by Frankenmuth.

Attorney Kmiec moved, after the trial, to set aside the verdict, pleading what he should have plead throughout the litigation referencing the issues of reliance, estoppel, policy languages, and Wisc. statue defenses. Kmiec blamed the judge's clerk for not taking his objections to the judge of which none appear on record. Judge Curran denied the motion and

dismissed Zahrans' complaint against Frankenmuth and dismissed the counterclaim based on Frankenmuth's failure to submit jury instructions on their claims and Frankenmuth's failure to prove reliance on Zahrans' alleged misrepresentations which was an element of their claims of misrepresentations plead in their affirmative defenses and counterclaim.

Zahrans' appealed and the appeal court affirmed the district court's dismissal of Zahrans' claims and remanded the case to the district court for the entry of judgement against Zahrans on Frankenmuth's counterclaim. The appeal court stated that Zahrans waived at trial their objections and defenses of estoppel, reliance, innocent insured, and introduction of prejudicial evidence because they were not raised at trial among other waived defenses. Appended p. 1-13

Following the appeal court decision, Zahrans filed their action for malpractice against their attorneys for breach of contract, negligence, and fraud.

**The Expert's Testimony**

At the trial in the malpractice case, Thomas Gooch, (Zahrans' expert) testified he is a member of both the 7th Circuit and the U.S. District Court Bar since 1979 and that most of his work is in the area of legal malpractice and he is qualified to render an expert opinion based on his knowledge of the facts and the issues and that he met Zahrans, read the jury instructions, depositions, trial transcripts, and researched the applicable laws, and Frankenmuth policy provisions before he rendered his opinion.

Gooch concluded that Schmidt violated his duty of care and was negligent for failure to amend the pleadings, and for the filing of an erroneous proof of loss, and that Schmidt's failure to withdraw from representing both of Zahrans upon realizing that Frankenmuth was directing its accusations of concealment and fraud at Robin Zahran not at Karen Zahran, especially were the policy language and contract considered Robin Zahran and Karen Zahran as separate, individual and distinguished insureds, and that representing both was a conflict of interest which

commanded malpractice, negligence and a breach of duty of care in lieu of Frankenmuth's allegations.

Gooch's testimony was that Schmidt was negligent in that he failed to deal and invoke the policy language clear defenses that no misrepresentation or breach of affirmative warranties effects Frankenmuth's obligation under the policy until they (1) Frankenmuth relies on it **and** it is either material or is made with intent to deceive or (2) the act misrepresented or falsely warranted contributes to the loss and that Schmidt should have plead that Frankenmuth made payments prior to the submittals of any proofs of loss and that Schmidt should have stressed, plead, and pursued the innocent insured rule pursuant to Wisc. Law and that the policy cannot be voided as to an insured for a wrong or misdeed of the other insureds.

Gooch's opinion was that Burrell failed to recognize that he should not have represented both Robin and Karen Zahran because of the innocent insured rule and conflict of interest, especially where he communicated the fact referencing Karen Zahran and Wis. Law to Frankenmuth when it plead that Robin Zahran may have been involved in misrepresentation and that Burrell could have only represented one of them zealously. Therefore, he violated his duty of care and was negligent and guilty of malpractice.

Gooch's testimony was that Burrell filed no pleadings referencing the innocence of Karen Zahran, nor carried out any discovery on the issue of reliance on Zahrans' misrepresentations as alleged by Frankenmuth, nor did Burrell address the issue if Frankenmuth should have been estopped from pursuing their claims plead in their affirmative defenses and counterclaim, and that the lack of discovery by Burrell on these issues was a breach of the standard of care and an act of negligence, malpractice and a breach of contract.

Gooch concluded that the failure by all the attorneys to carry discovery on Frankenmuth's allegations or to plead the issues of reliance and estoppel as affirmative defenses to Frankenmuth's counterclaim and their failure to bring these issues to the attention of the court at an earlier stage, in lieu of

Frankenmuth's creation of smoke-screens and inferences of fire occurrences by Robin Zahran as a bargaining tool as they relate to the insurance policy provisions, were so basic and fundamental that it commanded findings of breach of the standard of care, negligence and malpractice.

Gooch's opinion was that Kmiec had a conflict of interest in representing both Robin and Karen Zahran preventing him from using the innocent insured argument at trial, and that Kmiec did not attempt to correct Schmidt's erroneous proof of loss, nor did he file motions in limini referencing the fire issues to be barred from being introduced at trial, and that Kmiec objected to consolidation of both cases which resulted in prejudice, confusion, surprise, suspicion and multiple litigation and appeals over the years.

Gooch's opinion was that Kmiec failed to raise or preserve the innocent insured rule, estoppel, reliance, prejudicial evidence introduced at trial arguments, for review on appeal by failing to raise them during trial, or in post-trial motions, or at the jury instruction conference, nor did Kmiec offer jury instructions on the subject of reliance, estoppel, innocent insured, policy language provisions. Nor did Kmiec move to dismiss Frankenmuth's counterclaim prior to the case going to the jury due to Frankenmuth's lack of proof on their allegations of reliance on any of Zahrans' alleged misrepresentations plead in its affirmative defense and counterclaim and for Frankenmuth's failure to provide jury instructions on its counterclaim even after so ordered by the court, nor did Kmiec object to the jury verdict first question because he never read it, nor knew its contests until after the jury started their deliberations.

## PROCEDURAL HISTROY IN THE COURTS BELOW

Zahrans filed their action for breach of contract, malpractice, negligence and fraud in the US District Court for the Eastern District of Wisconsin after the Appeal Court issued its order on March 28, 1994 ruling for Frankenmuth and

directing the district court to enter judgement on Frankenmuth's counterclaim. The Appeal Court rejected Zahrans arguments on appeal referencing estoppel, reliance, prejudicial evidence introduction at trial, opening and closing argument infractions, innocent insured arguments as have been waived, since they were not raised at trial. Appended p. 1-13.

Zahrans' appeal was preceded by the District Court order denying Zahrans motion after verdict for a new trial brought by attorney Kmiec, and Frankenmuth's motion for judgement on its counterclaim. Appended here p. 14-16

The District Court based its decision on Wis. statute 631.11 (1)(b) referencing misrepresentation and breach of affirmative warranties, and on Frankenmuth refusal to submit jury instructions on its counterclaim and its failure to prove that it relied on Zahrans' representations to its determent.

Appended p. 17-18.

The malpractice case was originally assigned through random to Judge Gordon. On or about May 1997, Judge Gordon reassigned the case without random to Judge Clevert who was familiar with certain witnesses, testimonies and who failed to disqualify or recuse himself based on 28 USC 455. Due to his familiarity with the witnesses and the record of the case, Judge Clevert, upon assignment struck Zahrans jury demand over Zahrans' objections in his order dated May 29, 1997, and disallowed Zahran from taking Kmiec's deposition testimony.

At the trial, Judge Clevert disallowed Zahrans from eliciting testimony from Frankenmuth's original witnesses in the underlying case which would have shown contradictory statements that were available for Kmiec but failed to use, (Appended p. 26-29 and p. 30-36) and disallowed Zahrans from introducing evidence to prove the attorneys negligence through their handling of the fire adjustment and complaint. He stated that he will allow evidence only to the allegations of the tornado malpractice case. Finally, Judge Clevert made his rulings without final arguments stating he knows the issues and was in no need of argument presentations.

After Judge Clevert's rulings, Zahrans filed their detailed and specific Rule 59 motion addressing Judge Clevert's erroneous and prejudicial rulings of which he denied. Zahrans appealed and retained Attorney Andy Cohen, who is a named attorney on the honor roll of the 7th Circuit, and both agreed as a condition of his representation, that Cohen will review with Zahrans the appeal briefs before he files them.

On Sept. 18, 1998 as a result of one of the appeal briefs filed by Cohen without Zahrans' knowledge, the appeal court issued an order sanctioning Zahrans for filing suit against Frankenmuth and Manitowoc County Sheriff Department for the take over of Zahrans' farm property and animals to aid Frankenmuth in executing its collection of its judgement obtained against Zahrans pursuant to the appeal court order in Case No. 90-C-337. That take over occurred on April 25, 1996 and is related to the writ of certiorari petition No. 99-518.

Cohen and Zahrans, upon reading the appeal court panel decision and sanctions dated 9/18/98, believed that Zahrans will not have a fair hearing before the appeal court panel because of their prejudicial determinations against Zahrans as appears in their tone and order of Sept. 18th combined with Attorney Cohen's statement to Zahrans that certain of the panels law clerks informed him that the judges directed them to discard and draft rulings against Zahrans' appeals and motions without wasting time and agreed to move the panel for disqualification and for reassignment pursuant to circuit court rules on assignment and disclosure of panel judges.

Cohen failed to act, replying to Zahrans he wasn't going to take a chance in lieu of his relationships with the court, suggesting to petition the Supreme Court requesting from the Honorable Justice Stevens to stay all pending matters before the 7 th Circuit referencing Zahrans until he files a petition for disqualification of the panel members. Accordingly, Zahrans agreed. Cohen informed Zahrans on 11/03/98 that he petitioned the Supreme Court to stay all pending matters and orders of the appeal court until a ruling by the Supreme Court on Zahrans'

petition referencing the assignment and the constitution of the panel is issued. Appended p. 116-118

Zahrans discovered that Cohen, in fact failed to properly file the petitions with the Supreme Ct., nor did he notify the 7th Circuit of his petition, and filed the two additional briefs, one of which is the subject of this instant petition and another petition without Zahrans knowledge or approval of which he inadequately briefed the issues. Zahrans further discovered additional fraudulent conduct by Cohen referencing the payment of fees, accordingly, Zahrans moved the appeal court on 12/18/98 to allow them the opportunity to file appeal briefs on their own behalf due to fraud of Cohen. Appended p. 51-52 The court granted and entered a scheduling order, dated 12/22/98, received on 12/28/98, allowing the filing of limited supplemental briefs by Zahrans within extremely limited time period. The appeal court further denied Zahrans' motions to compel Cohen to turn over their files so they could prepare their supplemental briefs and denied Zahrans' motion for extension of time by eleven days to file their brief. Appended p. 53-54

The appeal court further denied Zahrans' motion for extension of time by 11 days to file their supplemental brief and denied their motion to file their brief to contain 12,000 words instead of 7,000 words and denied Zahrans' motion to file their brief for being late five (5) minutes instanter. Appended p. 55-57 The court further denied Zahrans' motion to reconsider the denial of filing their appeal brief, Appended p. 58 but allowed appellees to file their briefs instanter on 2/24/99, Appended p. 59, and denied Zahrans' two motions for disqualification or reassignment. Appended p.60-61

On Feb. 22, 1999, Judge Clevert granted all the defendants bill of costs. Zahrans appealed. Appeal #99-1780. The appeal court, without briefing or allowing Zahrans to brief their appeal, summarily affirmed the district court granting of costs to Defendants against Zahrans in its unpublished order dated April 14, 1999. Appended p. 63 - 71.

The appeal court stated in their order that they issued their order and judgement after they inspected the file, and the

record submitted to them on March 10, 1999 consisting of 6 volumes of pleadings, 16 loose pleadings, 20 volumes of transcripts, and 3 exhibit boxes without oral argument. These statements seem to contradict the record of the transmittal letter dated March 30, 1999. Appended p. 107-108.

The submittal letter of the district court shows the file was sent to the appeal court from Milwaukee, Wisconsin on March 30, 1999, which contradicts the appeal court letter dated May 6, 1999 informing the clerk of the district court for the Eastern District of Wisconsin that there was no record filed in appeal no. 99-1780, Appended p. 109-110 referencing the bill of costs appeal, further showing that the appeal panel made their decisions, written their order with all its citations, and inspected the huge record of the main two appeals and briefs in less than 14 days. This fact gave much credibility to Attorney Cohen's statement referencing the panel's predetermined thoughts and decisions on Zahrans' appeals.

## ARGUMENT

### 1.

### ZAHRANS CONSTITUTIONAL RIGHTS TO A JURY TRIAL PURSUANT TO THE 7TH AMENDMENT WERE DISCARDED AND VIOLATED BY THE LOWER COURTS THROUGH STRIKING ZAHRANS' JURY DEMAND

The subject complaint was originally assigned to Judge Gordon who granted Zahrans' motion to file their amended complaints in February, 1997. Karen Zahran filed her amended complaint and demanded a jury trial per Rule 38(b). Judge Clevert was substituted for Judge Gordon. He immediately struck the jury demand the first time he held a hearing to familiarise himself with up to date history of the case. Zahrans objected to his striking the jury demand and the court denied their objections.

It is well established and rooted in our laws and Constitution that a court's denial of a jury trial upon demand is

reviewed with the most exacting scrutiny U.S.C.A. Seventh Amendment, and unless the denial is harmless, appeal courts must reverse order upon the unconstitutional denial of rights to a jury trail. The lower courts violated Zahrans' basic constitutional rights to a jury trial by striking Zahrans' jury demand. *A.C. Miller Federal Practice and Procedures*, 2234 at 115-116, (1971) *Herschinger v. All State Co.*, 884 F Supp. 317, *and Whirlpool Financial Corp. v. Delaware Corp.*, 866 F. Supp. 1102 (N.D. IL 1994) *Partee v. Buch*, 28 F.3d 835 (C.A. 7 1994) and *McCarthy v. Bronson*, 906 F.2d 835 (C.A. 7, 1990). It is an error to strike a jury demand unless the defendant was entitled to a directed verdict. *Partee v. Buch*, 28 F.3d 835 (C.A.7 1994) *McCarthy v. Bronson*, 906 F.2d 835 (C.A. 7 1990) *William Dasho v. Susanehannh*, 461 F2d 11 (C.A.7) *F.U.I.C. v. Myron Palermo*, 815 F2d 1329 (C.A.10) and *Daniel InterNatl v. Moore*, 916 F2d 1061.

The striking of the demand and its affirmation on appeal which the panel ignored to address is in conflict with other U.S. Court of Appeals decisions and with this Court rulings and opinions. It is well established in the American system of justice that a trial by jury, impartially selected, is a right that should not be compromised as there is nothing of greater excellency than a trial by juries which represents the courthouse democracy. None could have put it clearer than one of this court's own members, Chief Justice William H. Rehnquist *in* declaring,

"The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence."

"A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded..."1

"[T]hose who oppose the use of juries in civil trial seem to ignore [that] [t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."

"The guarantees of the Seventh Amendment will prove burdensome in some instances....But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the Amendment."

This opinion is exactly on point as it relates to this case and issue of courtroom democracy and protection against tyranny and corruption in the administration of courtroom justice through rights of citizens for a jury trial and guards against such possible tyranny. Accordingly, these petitioners pray this Honorable Court to remand the complaint for a trial by jury

There was no constitutional challenge to Wis. Statute 631.11 (b) referencing the policy provisions on reliance. Its enforcement is conclusive upon the courts and the parties, *Old Dearborn Distributing Co. v. Seagrams Distillers Corp.* 299 U.S. 183 81 L Ed 109 57 S.C.T. 139 7, and is not subject to other interpretations by the federal courts as they must apply it as written by the state legislature, nor could they substitute their social and economic beliefs for the judgement of legislative bodies, who are elected to pass laws. *North Dakota State Board of Pharmacy v. Snyder Drug Stores Inc.* 414 U.S. 156 38 L Ed 2d 379 94 S.C.T. 407.

## 2.
## THE LOWER COURT DEFECTED FROM THIS COURT'S RULINGS AND GUIDELINES ON EXPERT'S MALPRACTICE

A. Wisconsin Standard Rule on Malpractice

The standing rule in legal malpractice pursuant to Wis. Law is that the best evidence in a case is the record of what happened in the original case. Zahrans' malpractice expert testimony was almost a verbatim recitations of what actually happened in the original case. Had the record of the underlining case been considered by the lower courts and by the appeal court based on Wis. statute without prejudice and prejudicial determinations, there would have been only one conclusion, and that Zahrans must prevail as a matter of law pursuant to Wis.

Statute (893.53) governing malpractice, because the fact issues are decided by the jury and the law issues are decided by the court. *Helmbrecht v. St. Paul Co. 122 Wis. 2d 94 362 NS. 2d 118.*

The lower courts did not want nor consider the record of what happened in the original case, evidenced by the courts attempts to justify their reasoning for their rulings in attacking Zahrans for their persistence in seeking the truth pursuant to the Code of Civil Rules of Civil Procedures.

The Wisconsin Supreme Court in *Dethorne v. Bakken*, 535 N.W. 2d 91, declared that there is areas of malpractice where the issues, facts, and the law are clear to the point where an expert's testimony is of no need to help the trier of fact. In this case, the trier of fact is a federal judge. He was of no need to have an expert explain to him the previous court's rulings referencing the infractions and negligent acts and waivers of defenses in the original case against Frankenmuth and that the Plaintiffs' attorneys waived and did not pursue their duties as was assigned to them by their clients.

B. Zahrans' Expert Testimony

As pointed out, Zahrans' expert testified specifically to what actually happened in the earlier litigation at all stages supported by the facts and the court rulings throughout. Even the Defendants' experts agreed with Zahrans' expert referencing what happened in the original case regarding the waivers by Zahrans' attorneys of Zahrans defenses including but not limited to: reliance, estoppel, policy provisions referencing misrepresentations, Wis. Law 631.11(b), the Defendants failure to carry discovery on Frankenmuth's allegations and pleadings, and their failure to move to dismiss the allegations due to lack of proof.

Zahrans' expert testimonies at trial was totally supported by the law of the case that had been already established through the scrutiny of the original appeal court member findings and the findings of the district court in the original case, dated 3/28/94. Appended p. 1-13, 14-16. Dated

2/28/92 The original panel and the district court found that the Defendants failed to raise in the underlining proceedings and waived the issues of reliance, innocent insured, estoppel, waiver, motion to dismiss Frankenmuth pleadings as a matter of law, amending of pleadings, discovery and other matters; all of which are elements of malpractice.

C. The Original Court Findings Support Zahrans' Legal Malpractice Claims

The lower court's findings were that Zahrans' expert was not credible and not to be believed in lieu of the record and the law of the case contrary to what was found by the original two courts who rendered an opinion of the file. It is unfounded and an abuse of the judicial powers of the court through the demonstrating of bias and prejudice, especially where the new judge couldn't change the older findings on res dujicata grounds but ignored it anyway.

Judge Curran, who tried the original case, and the appeal Judges Coffey, Cummings, and Zagel found that Frankenmuth did not rely on Zahrans' alleged misrepresentations as plead in their affirmative defenses and counterclaim and as expert Gooch testified that all the issues that were raised in the malpractice as infractions by the attorneys have been waived including objections to Wis. Statute 631.11(1)(b) referencing misrepresentations, reliance, estoppel, and policy provisions.

It is clear that Judge Clevert and the panel in affirming his order and judgement were clearly bias as was demonstrated by their rulings and as evidenced by their prejudicial determinations and their failure to follow the rules established by this court referencing expert testimony in *Daubert v. Bakken*, 125 LEd 2d 469.

D. Defendants Experts Agree With Zahrans' Expert

Kmiec's own expert admitted to the infractions that Kmiec committed and failed to do, including the failure to raise the issues of reliance and estoppel at trial or requesting jury

instructions. These various waivers of defenses is malpractice. *Cook v. Continental Casualty,* 180 Wis. 2d 237 509 N.W. 2d 100.

Kmiec's expert admitted at trial that he missed an opportunity and committed a negligent act for failure to move to dismiss Frankenmuth's counterclaim at the time Frankenmuth refused to submit jury instructions on its counterclaim. *Celotex Corp. Inc. (i.d.)* That waiver was a negligent act, breach of contract and the duty of care upon applying Wis. Law, other jurisdictions, and this Court as precedents. *McNight v. Gingras,*966, Fed. Supp 801 E.D.W. (1997), *Eagle Foundation v. Dole Global Mututal of N.Y. v. Wulff,* U.S. 326 24 L.Ed 387, *Overstreet v. Kentucky Central Life*, 960 F2d 1020, Judge Clevert totally ignored these waivers.

Kmiec waived the argument of the policy provisions that Zahrans claims cannot be defeated absence reliance on these claims by Frankenmuth. Such waiver was malpractice pursuant to Wis. Law and the law in the 7th Circuit jurisdictions. *Transport Inc. v. Galvin,* 39 F3d 812 (C.A. 7)

Zahrans' defenses were clear and simple. All Kmiec had to do was to plead the non-reliance, as admitted by his own expert and elicit the testimony at trial from Frankenmuth's' witnesses to prove that reliance was a condition that Frankenmuth had to prove before they could prevail on their pleadings. Kmiec failed and his excuse was that, "We were simply out-gunned." There was no misrepresentation waiver of a defense or a right and failure to carry discovery on the defenses and rights of a client's attorneys negligence and malpractice. *American Adjusters v. Galvin.* (i.d.), *McKnight v. Gingras.*

E. The Lower Court's Prejudice

Judge Clevert and the appeal court panel are blaming Zahrans for multiple litigation referencing the tornado and fire litigation's which all should have been in one case right from the beginning. Had Zahrans' attorneys carried all discovery needed, named all the interested parties, filed all the necessary pleadings,

and behaved as responsible attorneys, they would have saved much resources and expenses of all involved including the courts and especially Zahrans as they have footed the bill throughout the last 10 years, and had Kmiec not objected through the filings of his unlicensed and acting attorney's son's to object to consolidation motions filed by Frankenmuth for fire and tornado cases in court without Zahrans' knowledge or approval the outcome may have been totally different.

F. The Attorneys' Specific Acts

None of the attorneys advocated zealously Zahrans' positions nor did they forward the facts. The obligations and duty of Defendants' legal ethics in the representation of their clients requires zealous advocacy of a client's position. *Dirkington v. Hendricks County Electric Corp.*, 460 N.E. 2d 1006. Zahrans' lawyers should have been more careful than more careless. These acts and circumstances bring an almost identical recent malpractice case determined by the 7th Circuit in which Honorable Judge Posner commented on attorney's negligence. *American International Adj. v. Galvin*, 86 Fed. 3d 1455

In the original case, Frankenmuth had the duty to prove at trial their pleadings on file with the court to prevail. Wis. Law calls for the reversal of the district court decision where the trial court has incorrectly decided a legal issue, *Germanotta v. National Indemnity Corp.*349 N.W. 2d 733, 119 Wis. 2d 293 or if the law have been erroneously applied without deferral to the trial court. *Roe v. Larson*, 287 N.W. 2d 824, 94 Wis. 2d 204. In this case, reversal should have been the judgement by the appeal court pursuant to Wis. Law on malpractice when section 631(11)(b) provisions and the policy provisions are applied.

G. The Attorneys Had Conflict of Interest

An attorney may act as counsel for both parties with the knowledge and consent of both, but when a conflict of interest does arise, it becomes his duty as an attorney to make full

disclosure to both or to terminate the relationship of attorney and client as to both. *State v Rogers*, 226 Wis. 39 275 N.W. 910 and *Kagel v. First Commonwealth Co.*, 534 Fed. 2d 194.

Frankenmuth's pleadings created such conflict. The attorneys did not act on their conflict of representation with Robin and Karen Zahran nor made any pleadings. Kmiec did not raise at trial the innocent insured argument because no one plead it in the first place and that such should have been plead if is to be pursued, according to his expert pursuant to Wis. Law and many other jurisdictions as the right of each insured is separate and if innocent, they can't be forfeited. *All States Ins. v. Janes*, 845 Fed 2d 315 (C.A.11) *Hanes v. Hanover*, 783 Fed2 136. Frankenmuth (the original Defendant) recognized that fact and law.

Karen Zahran's attorneys duties to her were independent of their duties to Robin Zahran. They should have represented her interests without interference of other loyalties or ethical obligations to Robin when the issues arose at the time in that Frankenmuth started their accusations at Robin Zahran. The attorneys should have recognized their duties and withdraw from representation of either of Zahrans in order for her to utilize Wis. Law referencing innocent insureds as declared in *Hedtke v. Sentry Ins.* 109 Wis 2d 4651 326 N.S. 2d 717 (1982).

Attorneys failure to act on the conflict of interest under the circumstances resulted in waivers and forfeitures of Karen Zahran's claims which they failed to advocate independent of Robin Zahran. *Lane V. Richard*, 957 Fed. 2d 363 (C.A. 1992), *Mahoney v. Kesery*, 778Fed. Supp. 1002 E.D. (WI)

## 3.

## THE LOWER COURTS DEFECTED FROM THEIR CONSTITUTIONAL AUTHORITY IN OVERRULING THE STATE OF WISCONSIN STATUTES AND WISCONSIN SUPREME COURT RULINGS REFERENCING WISCONSIN INSURANCE STATUTES

The federal courts must apply state law expressed through its statutes and interpreted by its Supreme Court pursuant to the provisions of the U.S. Constitution declared in the Erie Doctrine.

The Defendants failure to move to dismiss Frankenmuth's affirmative defenses and counterclaim pleadings pursuant to policy language referencing reliance, (Wis. Law (631.11(1)(b)) and the estoppel principles, in effect waived Zahrans' rights through negligence because the law is clear; a party's assertion of fact in their pleadings is a judicial admission by which they are bound by it throughout the proceedings except if waived. *Schoot Motorcycle Supp. v. American Howder Corp.*, 976 F2d 58. *Celotex Corp. v. Catrett*, 477 U.S. 317 322 106 S.Ct 2548 2552 91 L.Ed 265(1986)

Pursuant to Wis. Law, the basis of an insurance company's defense or denial of coverage must be declared within 60 days of the denial. *Estate of Logan by Fink v. Northwestern Natl.*, 416 N.W. 2nd 65 140 Wis 2d 871. Frankenmuth denied Zahrans any more payments on their claim on 11/18/90, for the reasons that they had made all the payments in full upon their own assessment of damage, not as the appeal court erroneously found that Frankenmuth declined payment upon discovery of fraud in the proof of loss as such assertion never came about until after Zahrans' filed suit in 1990. Frankenmuth was therefore, precluded from changing that position after Zahrans filed suit and the attorneys did not reply, and accordingly and waived Zahrans' rights for an objection pursuant to the rights that have been established as of the date of incident and claim. *Gryms v. Sanders*, 93 US. 55 236 E.D. 789. *Globe Mutual of U.Y. v. Wulff*, U.S. 326 24 L. Ed 387, holding that conduct after breach indicating election to treat policy as valid keeps policy valid. *Pence v. Langdon*, 99 U.S. 578 25 L.Ed 420, holding that when a company is advised of wrong, they must decide immediately either to affirm or to deny otherwise, they will loose their right to rescind and must seek compensation in damages.

The lower courts misapplied Wis. Law referencing reliance on misrepresentations in a proof of loss as declared in the *Templis Case,* which held that Wis. Statute 631.11(1)(b)(1) referencing reliance allows for the a voiding of policy coverages misrepresented in a proof of loss **if such misrepresentation is material and if only the policy language provides for violence of coverage.** *Northwest Natl v. Nemetz*, 400 N.W. 2d 23 135 Wis. 2d 245. *Templis v. Aetna*, 164 Wis. 2d 17, 473 N.W. 59, (91)

Zahrans' policy provisions referencing reliance specifically stated that nothing would defeat the insureds' rights under the policy for the collection of damages except that if: (1) **we rely on it and** (a) **it is material** or (b) **made with intent to deceive.** Kmiec's expert testified that Kmiec failed to make that argument on reliance, estoppel and waiver and that an objection at trial should have been made if the issue was going to be raised at trial. Zahrans' attorneys waived Zahrans' defenses pursuant to policy provisions and Wis. Statute and Wis. Law declared through the Wis. Supreme Court decisions as pointed out in this petition of which the circuit panel are refusing to want to recognize in contradiction of Wis. Supreme Court decisions and Wis. Statutes.

Wisconsin Supreme Court decision, in the *Templis Case* Wis 2d 1 485 N.W. 2nd (1992), declared the state doctrine referencing insurance claims in that an insurance company could only void coverages on the items misrepresented and must pay the items that were not. Frankenmuth's policy did not provide for voiding policy absence of reliance. Wis. Supreme Court in *Templis* declared the policy language controls and absence the contractual right to void coverage, in absence of reliance, coverage cannot be denied nor voided. *Templis (i.d.), citing Folk v. Natl Ben Franklin Life*, 45 IL 3d 595 359 N.E. 2d 1056-57 (1976)

This court held that a judgement should be entered against a party who fail to make a showing or to establish the existence of the elements of that parties claim which must be

proved at trial. All what the Defendants in this case had to do was to plead for the dismissal of Frankenmuth's pleadings in its defenses and counterclaim upon its failure to prove the element of reliance contained in its pleadings- a fact found by the district court, (Judge Curran) but waived it. *Celotex Corp. v. Catrett*, 477 U.S. 317 322 106 S.C.T. 2548 25529 L. ED 265 (1986)

Judge Clevert's rulings and his affirmation on appeal contradicts the 7th Circuit's own declarations, rulings, and findings on March 28, 1994 and in violation of this court's published law. *Celotex Corp. (i.d.)* - Appended p.1-13

This Court had always held and declared that the federal courts must defer to the opinions of local tribunals and bodies as they are in a better position to judge and legislate their own affairs. *Schmidinger v. Chicago* 226 U.S. 578 57 L Ed 364.33 S.C.T. 182. Accordingly, a statute or a court order that limits the state powers will be unconstitutional and void. *State v. Sensenbreaner*, 262 Wis. 118 53 N.W. 2d 773, *Chicago L.A.R. Co. v. Tranbarger* 238 U.S. 67 59 L.Ed 1204 35 S.C.T. 678. *Hammer v. Dagenhart* 247 U.S. 251 62 L Ed 1101. S.C.T. 529 3 ALR 649. The lower court's actions and decisions in this case fall exactly under these admonishments.

**4.**

## THE COURTS BELOW DEFECTED FROM THE BASIC AND NORMAL COURSE OF JUDICIAL PRODEEDINGS RESULTING IN THE CONFISCATION OF PETITIONERS' CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION PURUSANT TO THE 14TH AMENDMENT AND VIOLATION OF THEIR RIGHTS TO DUE PROCESS PURSUANT TO THE 5TH AND 14TH AMENDMENT OF THE CONSTITUTION

A. The Lower Court and Appeal Court Panel Were Improperly Assigned, Constituted, and Disclosed.

Upon Judge Gordon's withdrawal, the case was assigned to Judge Clevert without random assignment in violation of the local rule of the Federal Court in Milwaukee,

Wisconsin referencing assignment of cases. (Sec.4.01 of local rules, and (28 U.S.C.{137), nor did Judge Clevert recuse himself due to his familiarity pursuant to (U.S. Code 455) with the facts and witnesses and may have been already prejudicial.

Upon appeal, the case was assigned to a panel of appeal court judges that were improperly constituted and disclosed, in violation of the 7th Circuit Rules, sec. 3 of the 7th Circuit published rules which states that the judges will be assigned by random and that, "the identity of the three judges on any panel is not made public until the day the cases are argued. An exception to this procedure occurs when a previously argued case is on the docket for a subsequent hearing. In this situation the original panel may be reconstituted to hear the second appeal."

None of the original panel members in the original appeal participated in this appeal. The Constitution of these panel members were predetermined and served to deprive Zahrans of due process and the equal protection under the 14th Amendment in lieu of their views referencing Zahrans in the other dispute. This assignment brings to Zahran's attention what Attorney Cohen had referenced that no fair hearing before this panel will occur which prompted him to file a petition with the Supreme Ct. for disqualification of the panel members due to their known demonstrated prejudice against Zahrans, in direct violation of the U.S. Constitution. Appended p. 116

B. The Lower Courts Misapplied the Law In Effect Overriding the Erie Doctrine by Discarding Wisconsin Law to Achieve a Predetermined Order and Judgement

The decision of the lower courts were in conflict with the decisions of the U.S. Supreme Court declared in the Erie Doctrine which held U.S. Courts sitting, pursuant to diversity jurisdictions, must apply the law of the forum state as declared by that particular state statute and interpreted through it's Supreme Court decisions. *Erie & Co. v. Tompkins*, 304 U.S. 64 1 E.D. 118 858 S.C. 817.

This doctrine is rooted in the 14th Amendment of equal protection and relates to the police powers of the states in this case. The lower courts displaced the law of the State of Wisconsin and inserted their own without support of legal precedence which is in direct violation of the U.S. Constitution. In fact, their actions were in violation of this Court's declared rulings and the U.S. Constitution because when the federal courts are called upon to solve disputes between parties based on diversity or called upon to adjucate issues upon a particular state law, they should and must very cautiously,extremely and carefully exercise their powers over contracts between parties which are subject to state statues or regulations. Federal courts have no power to take the power of the legislate from the states, or to supervise the state regulations and statues established under the state power because these statutes and laws are beyond interference by the federal government except by Constitutional authority. *Federal Power Co. v. Natural Gas Pipeline* Co. 315 U.S. 575 865 L Ed 1037 62 S.C.T. 736.

Judge Clevert and the panel members totally ignored Wis. Law referencing reliance, estoppel, innocent insured, policy provisions governing the contract between the parties and Wis. Statute (631.11(1)(b)) and Wis. Supreme Court decisions as outlined in this petition. This Court mandates, referencing the state powers which calls for this Court to exercise its supervisory power over a court that showed disregard to the rule of law and the authority of the supreme court of the land.

The courts may not unreasonably invade private rights or interfere with personal liberty or contractual obligations. *Kingsley International Pictures Corp. v. Regents of the University* 360 U.S. 684 3 L Ed 2d 1512 79 S.C.T. 1362 As such infractions would be a violation of the right guaranteed under either the federal or state constitution and can't be sustained. *Mayer v. Nebraska* 262 U.S. 390 67 L. Ed 1042 43 S.C.T. 625. Zahrans researched and dug deep to their very souls to come to the grips of what happened and seeking justice and hope to get it through this Court.

C. The Lower Courts Violated Zahrans' Rights of an Opportunity to be Heard

The panel decision and rulings were clear violations of Zahran's constitutional rights to basic justice and a fair opportunity to be heard on the issues without prejudice- a violation of their 5th and 14th Amendment of equal protection and their rights of due process pursuant to the Amendments. *Panhandle Geastaran Pipeline Co. v. State Highway Comm.* 294 U.S. 613 79 L. Ed 1090 55 S.C. T. 563

D. The Deprivation of Zahrans' Right to Appeal

The Defendants huge amount of costs and copying expense were charged at a much high rate than what is normally allowed in the 7th Circuit jurisdictions and by Judge Clevert himself when he approved costs in another matter relating to this case. The costs were inexcess and were in violation of the U.S.C. {920 Statute but was affirmed by Judge Clevert and the appeal panel.

The appeal panel affirmed the Bill of Costs without seeing the record as demonstrated, in fact, this entire case seems similar to *Alice in WonderLand.* Yet, the panel stated in their decision that the record was inspected at the time the district court record shows it was not even submitted to the appeal court. One must question the accuracy of their decision as a whole in lieu of their statements. One must further question and relate back to Attorney Cohen's statements referencing the predetermined thoughts of the appeal court panel and Judge Clevert striking of Zahran's jury demand, a question these petitioners don't care to find out its reasoning nor will speculate

E. Prejudicial and Abuse by the Lower Courts

In a recent decision by Judge Clevert which is related to this case, Zahrans objected to certain of the deposition transcripts bill of cots, Judge Clevert stated: " It was prudent for Cleary to take Zahran's depositions. Indeed, it would have been shocking if it had failed to do so." Judge Clevert chose

not to be shocked by the attorneys negligence and carelessness when they failed to ask questions or carry discovery on the very serious acqusations and allegations made by Frankenmuth that Zahrans committed fraud, an accusation that proved devastating to Zahrans entire life because they pursued to find the truth. Zahrans wish that no others may ever suffer from such fate at the time they believe and truly know they were innocent and made guilty of fraud through accusations and manipulations of the insurance company's designs and their attorneys' negligence.

At the trial and on many occasions, Judge Clevert was loud, mad, and threatening to hold Karen Zahran's attorney in contempt of court for voicing an objection. He was mad enough to leave the court room on a few occasions to calm down. With such behavior and with Judge Clevert's knowledge of many of the witnesses and the opposing attorneys and the evidence in the three cases that were before him involving Zahrans, some of which share the same witnesses and facts, he should have recused himself pursuant to U.S. code 455 U.S. Code U.S.C. § USS.(b). (R.90), because the appearance of impartiality is enough reason for the judicial officer to rescue himself as held by this Court. *Liliebery v. Health Services Acquisitions Corp.*, 480 U.S. 915 (1987) *Dotty v. Seawall*, 908 Fed. 2d 1053, as Zahrans were entitled to a nonpartial and a non-bias judge, pursuant to the 14th Amendment rights to equal protections and right to due process, nor could Zahrans believe that the striking of the jury demands was not a premeditated intentional act by Judge Clevert.

E. The Court Curtailed Zahrans From Introducing Evidence Relative to Proofs of Case

Zahran wanted to call the main named witnesses from the original case to prove there was inadequate and improper cross-examination by Kmiec, and fraud and conspiracy by Frankenmuth which would have changed the outcome of the original case. *Beech Aircraft Corp. v. Rainy*, 488 U.S 153 102 153 102 LEd 2d 445 109 S.C. 439.

Judge Clevert denied Zahrans their right to put a case within a case to prove their contentions. Judge Clevert schooled and interfered with the evidence production resulting in depriving Zahrans of their basic rights to due process where many court cases in the 7th Circuit jurisdiction hold that the 7th Circuit case law referencing legal malpractice cases hold that the best evidence in malpractice cases is the evidence of what happened in the original trial . *American v. Galvin (i.d). U.S. v. Grunther,* 631 Fed. 2d 583 587.

Judge Clevert's position, on the underlying case is "that case is gone," but the case within a case can't be proven until a party is allowed to prove the case in the underlying case including the use of witnesses, and other proofs. *U.S. v. Foskey,* 636 Fed 517 524 N.E.

Wis. Supreme Court declared rule on legal malpractice cases is clear and must be followed, **"that regardless of the approach used, the ultimate goal to be to determined in legal malpractice case ought to be what the outcome should have been if the issue had been properly presented in the first place."**

F. Sanctions

The appeal court sanctions directing Zahrans not to file any action in the court against any one until further permission of the court is a violation of Zahrans' rights and due process under the 5th and 14th Amendment of the U.S. Constitution. It clearly demonstrates that order of the panel's prejudice and an infringement of basic rights to access to justice that calls for this court's interference and supervision.

The issue here is whether the appeal court is exercising revenge against Zahrans in taking away Zahrans' civil liberties and the rights to redress in satisfaction of the appeal court determination that Zahrans should accept their fate through verdict that was begotten by fraud and deceit and illegal means and accomplished through the negligence of their attorneys on matters that may not relate to issues that could rise either in the coming two (2) years or later that have nothing to do with the

litigation of Frankenmuth Insurance Company or these Defendants.

The appeal court order that Zahrans not file papers for two(2) years or risk contempt proceedings at the time the court ordered in the Appendix p. 79 that Zahrans' affidavit should set forth facts showing that the pattern of vexatious litigation in which Zahrans have been engaged to date will reoccur if the petition is granted, is nothing but a permanent order to keep the courtroom door closed forever as Zahrans can't and won't be able to state such statements in their affidavit.

And when combining that order with the different treatment referencing the acceptance of the supplemental briefs, and giving Zahrans no ability to retrieve their records from Attorney Cohen to prepare their appeal briefs which deprived them of filing their briefs timely because they were 5 minutes late and the granting of the appellee's briefs to file their briefs instanter evidences the bias and prejudice the appeal court had towards Zahrans of which they believe the appeal court judges are either not reading the record and the briefs or are acting pursuant to some other motive, or rules that Zahrans never seen nor know about with all the research they have made referencing these issues over the last few years.

## 5.

## KMIEC'S ALLEGED AMENDED CONTRACT OF REPRESENATATION

Robin Zahran, under duress and pressure from Judge Curran to settle, told Kmiec he wants to prosecute the case through appeals and did not want to settle pursuant to Frankenmuth's offers. (noting to Kmiec that he would pay him $20,000- win or loose meaning all the way to the Supreme Court.

After the trial, Kmiec quit and did not pursue the case on appeal. He had no right to the promise as there was no consideration or performance, nor was the original agreement amended, nor did Karen Zahran agree to such alleged

agreement and commitment as was testified by Karen. Kmiec, at trial, admitted that the alleged note of $20,000 is nebulous as a consideration. Judge Clevert's rulings is erroneous and baseless, especially as to Karen Zahran.

It is a well established law that all transactions between an attorney and his client during their relationship are closely scrutinised and an alleged contract made after the relationship started will be construed strongly against the lawyer. *Elmore v. Johnson,* 143 IL 513 32 N.E. 413. There was no consideration received by Robin Zahran for this alleged promise, nor did she agree or was a party, nor was Karen Zahran involved for this alleged promise and thereof such alleged promise is void for non-performance by Kmiec. Even if Robin Zahran were to agree, it was mad under duress and therefore would be held invalid, pursuant to this Court declared findings. *Tayor v. Bemiss,* 110 U.S. 42 28 LEd 643 S.C.T. 441.

## CONCULSION

For all the above reasons, Robin and Karen Zahran pray that this Honorable Court grant their Petition for Writ or order that Zahrans' case be remanded for a jury trial and further, the appeal order sanctions, which in effect close the courthouse door on them forever, be lifted due to their inability now or at anytime to be able to draft an affidavit stating under oath as the appeal court stated in the affidavit, IT IS FURTHER ORDERED.....Any petition shall include a detailed affidavit ..... The affidavit should also set forth facts showing that the pattern of vexations litigation in which the Zahrans have engaged to date **will reoccur** if the petition is granted.

Respectfully submitted,

10-99

Robin Zahran

Karen Zahran

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
Argued November 1, 1993
March 28, 1994
Unpublished Order Not to be Cited Per Circuit Rule 53
Before
Hon. **William J. Cummings**, Circuit Judge
Hon. **John L. Coffey**, Circuit Judge
Hon. **James B. Zagel**, Circuit Judge*

| | | |
|---|---|---|
| ROBIN ZHARAN and KAREN ZAHRAN, | ) | Appeal from the United |
| Plaintiffs-Appellants, | ) | States District Court for |
| Cross-Appellants | ) | the Eastern District |
| No. 92-1778 and 92-1848 | ) | of Wisconsin |
| v. | ) | |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, | ) | No. 90 C 337 |
| Defendant-Appellee./ Cross-Appellant | ) | Thomas J. Curran, Judge |

ORDER

Robin and Karen Zahran insured their farm buildings and property located in Denmark, Wisconsin. On May 24, 1989, a tornado struck the farm damaging barns and other equipment. Adjusting the claim was an arduous process and neither the Zahrans nor their insurer, Frankenmuth Mutual Insurance Company, were satisfied with the outcome. The Zahrans sued for over $537,000 for property damages and consequential

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* The Honorable James B. Zagel, District Judge for the Northern District of Illinois, is sitting by designation.

damages, plus interest, attorney fees and costs. Frankenmuth eventually counterclaimed seeking to get back the $182,888.37 it had paid because, it said, the Zahrans wilfully hid or misrepresented material facts about their claim in order to deceive Frankenmuth. Jurisdiction was based on diversity of citizenship, so Wisconsin law applies.

A jury decided against the Zahrans and, in special verdict, ruled that the Zahrans transgressed the policy provision barring misrepresentation and fraud in claims. The district court entered judgment for defendant, denied the Zahrans' post-trial motions and ordered them to pay Frankenmuth costs. The Zahrans appeal this. Frankenmuth, in turn, appeals the district court's dismissal, without prejudice and without costs, of the Frankenmuth counterclaim.

There is a lot of detail in the facts of this case, all of which we have examined, partly because the Zahrans, who had lawyers at trail, proceeded without counsel on appeal and sought to retry the case before us, even to the point of citing evidence which was stricken by the trial court. We spare any non-party who happens on this opinion the burden of reading them, and the parties need no further recital.

The Zahrans say the verdict was contrary tot he evidence. This is a hard case to make. A reasonable basis for the verdict is all that is required. A jury may decide for a party with what, on the cold record, appears the weaker evidence. Tryzcinski v. American Cas. Co. 983 F.2d 307,315 (7th Cir. 1992).

What Frankenmuth sought to show was that the Zahrans claim was unworthy of belief.* The Zahrans said they simply

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* There is a spat over whether Frankenmuth had to show that it relied on misrepresentations in order to defeat the Zahrans' lawsuit. Frankenmuth did not. Tempelis v. Aetna Cas.

secured repair estimates from reputable contractors to defeat Frankenmuth's estimates. They did not prepare the estimates (more precisely, they say they "did not directly participate in [their] preparation:" and, if there were misrepresentations in them, they are not to be laid at the Zahran's door. Yet, Frankenmuth had evidence, which a jury could choose to believe, that Robin Zahran asked one estimator to quote, over the phone, a price for repairing one slurry tank ring and to the so without inspecting the damage; Robin Zahran then doubled the estimate and submitted a claim for two rings. On another occasion, Robin Zahran secured estimates of replacement cost for a seller of buildings who did not believe that replacement was necessary. A jury could infer that replacement cost rather than repair cost was used because Robin Zahran asked for it directly or implicitly.

Then there is evidence that total loss was claimed on barn 151 when Robin Zahran had an estimate for a much lower cost repair. When Robin Zahran claimed barns 152 and 154 were demigod, which he did not do until September 1989, nearly six months after the tornado, he said he had a written report from a structural engineer stating that barns 151 and 152 were unsound and total losses. This was untrue. A structural engineer did visit the barns, but did so in December 1989 and never prepared a written report. There was evidence that barn 154 was undamaged. One contractor testified that when he was talking to Robin Zahran about how the big barn could be

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& Sur. Co., 473 N.W. 2d 549 (Wis. St. App. 1991), aff'd and modified on other grounds, 485 N.W. 2d 217 (Wis. 1992). The spat is pointless because the Zahrans did not object to a jury instruction which excluded reliance as an element of the defense. Fed. R. Civ. P. 51; Sims v. Mulcahy, 902 F.2d 524, 525 (7h cir. 1990)

repaired, Robin Zahran told him "Stay out of it . I am going to get the insurance company to put me up a new barn . . . this is my showplace. Later Zahran called the contractor "several times a day any time of the day" and threatened to sue him if he repaired the barn.

Robin Zahran also claimed that a slurry tank pump was damaged. Later he learned it was undamaged but never notified Frankenmuth to withdraw that claim. There were photographs of the barns and the slurry tank which could have supported a finding that the tornado damage was no nearly so grave as the Zahrans claim. Finally, insurance and annuities as his principal occupation. He may not have been an expert on property and casualty insurance, but he had made property loss claims for himself, and a jury could believe he was not an insurance naif.

There is clearly enough here for a jury to reach a decision against the Zahrans.* We do not say the verdict was

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* The Zahrans argue they should not be treated as a collective entity. Whatever Robin Zahran may have done, there is no evidence that Karen Zahran did anything wrong. There are Wisconsin cases which allow an innocent insured to collect for damage intentionally caused by another insured. Hedtcke v. Sentry Ins. Co., 326 N.W. 2d 727 (wis. 1982). Whether that doctrine would apply here is open to question, and we do not have to answer. The Zahrans never presented this argument to the trial court during or after trial, never raised it in defense to the counterclaim, did not object to instructions referring to themselves collectively and referred to themselves collectively in closing argument. There is, incidentally, a good reason why the innocent insured argument was not made. In Hedtcke, the court noted that the trial court would have the authority to see that the wrongdoer insured would not benefit from the proceeds; something easy to do in the Hedtcke because the

inevitable. The Zahrans had something to say in their favor on most of the incidents brought up by Frankenmuth. It was up to the jury to decide whom to believe and what inferences should be drawn from the circumstances of the case. There is no reason to believe that this jury, or any jury, would not give a farm owner a fair shake in a dispute with their insurance company.

The Zahrans rely on Omaha Paper Stock Co. v. California Union Ins. Co., 262 N.W. 2d 175 (Neb. 1978), which held that an insurance company is equitably estopped from asserting misrepresentation in proofs of loss where the insurance company failed to have an expert engineer of its own choosing appraise the damage. A Wisconsin court has cited Omaha Paper and observed that Nebraska, (and only Nebraska), unlike Wisconsin, requires an insurance company to show that it relied on misrepresentation in proof of loss. See Tempelis, 473 N.W. 2d at 552. So we doubt that Wisconsin would adopt Nebraska's rule. And even if it did, it would mean nothing here for two reasons: 91) Frankenmuth did send its adjuster to examine the premises within days of the tornado and others came later, and (2) the Zahrans did not pursue the argument in

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guilty insured was hostile to the innocent insured and may have damaged the property to hurt her. (Judith Hedtcke, the innocent insured, had vacated the marital home, initiated divorce proceedings and obtained a court order directing Ronald Hedtcke to vacate the premises. Ronald, who later pled quilty to arson, burned the property three days before he had to vacate it). We do not see how it could be done in this case, and we suspect that the Zahrans' counsel also did not see how Karen Zahran could be paid without conferring some benefit on Robin Zahran.

the trial court, offered no instruction, and sought no jury findings of fact which would support application of estoppel.

The Zahrans cannot prevail here on the argument that the verdict was wrong. But they do make further claims that the trial was unfair and they ought to have the matter retried. The special verdict form, say the Zahrans, misled the jury into believing that an overvaluation of one item in the proof of loss would void the whole policy. this objection was made at trail, but not until the jury retained to deliberate and the district court ruled, as it could reasonable do, that the objection came too late. This argument is waived.*

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* It is also unpromising since the insurance contract states, unambiguously, that the "entire policy is void" is "whether before or after a loss" the insured has wilfully concealed or misrepresented any material fact or circumstance concerning the insurance or its subjects. In dicta the Court of Appeals of Wisconsin said that such a provision 'clearly puts the insured on notice that [post-loss] representations made by them can serve to void the policy." Tempelis v. Aetna Cas. & Sur. Co., 473 N.W. 2d 549, 554 (Wis. Ct. App. 1991). This dicta was echoed, although with less force, when the Supreme Court of Wisconsin affirmed and modified the court of Appeals judgement. Templis v. Aetna Cas. & Sur. Co., 485 N.W. 2d 217, 221-22. The Supreme Court also suggested that, where the misrepresentations covered a very small part of the claim, it might not enforce the contract provision, i.e., a fraudulent receipt for a $50 dinner might not void a $2,000.000 claim for the destruction of a home. That is not this case. And Wisconsin has not abandoned its rule that when faced with a clear insurance contract it will "merely apply" its terms according to their everyday meaning or policy definition. Kremers-Urban Co. v. American Employers Ins. Co., 351 N.W.

The Zahrans say the jury was allowed to equate innocent overvaluation with fraud. But he jury was told, without objection by the Zahrans, that "an exaggeration of value as mere opinion, a mere misstatement based upon an erroneous estimate of value, and honest mistake, an innocent overvaluation lacks the essential element of fraud and does not operate to void the policy." To find fraud a jury would have to find more than exaggerated opinion, erroneous estimate, honest mistake and innocent overvaluation. This is fair. Indeed, as to "exaggeration," one could read Lykos v. American Home Ins. Co., 609 F.2d 314, 316 (7th Cir. 1979) (Illinois law), to say that the instruction was more than fair.

The Zahrans next assign error to several evidentiary rulings. Frankenmuth wanted to prove that it paid the Zahrans for a fire loss at barn 151 which occurred on July 6, 1990. The district judge ruled the evidence inadmissible. There might be an inference that the Zahrans were suing to recover for property damage for which they were later compensated. The evidence may have been admissible for just this purpose if the barn had not been substantially rebuilt after the tornado. But we do not know if this is so because the district judge permitted only brief reference to the matter on cross-examination and then only to impeach credibility. When Robin Zahran testified, he was asked on cross-examination, without objection, whether he had made a fire loss for barn 151 in November 1990. He answered a later question , again without objection or motion to strike, that "75 is not correct" and that "151 did not have $75,000 for what you're talking about." With the court's permission, Frankenmuth showed Robin Zahran a draft of $75,000 for the fire loss on barn 151, when he admitted receipt of payment for barn 151. That was the end of the matter. It was within the

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2d 156, 163 (Wis. 1984)

discretion of the court to permit this to impeach Robin Zahran's credibility in light of Zahran's denial of receipt. There is no error.

The Zahrans wanted to prove that Frankenmuth was considering making an offer of an additional $25,000 to "resolve [the] entire matter." This, they argue, showed bad faith by Frankenmuth in making a 'low-ball" offer. There are barriers to admission of the evidence. Thinking about an offer is not the making of an offer and, if Frankenmuth did not actually make an unconscionable proposal, the evidence proves nothing here but that one Frankenmuth employee had questionable thought on which neither he nor his employer acted. Rule 408 would exclude from evidence an offer, had it been made, as the district judge ruled. Most importantly, there was no assertion at trial that this evidence was being offered in support of the bad faith claim. In the end, all that the Zahrans' counsel said was "I'm offering it simply to show that an offer was conveyed to Mr. Mours [Frankenmuth adjuster] by Mr. Spalding [Frankenmuth's claim supervisor]." This does not fairly advise the district judge of the purpose for which the evidence is offered, and so the Zahrans cannot complaint of the failure to admit it.

At some point, the district judge limited each side's testimony. We do not find this ruling in the record, but both sides agreed it was made and Frankenmuth does not dispute the Zahrans' assertion that the limit was nine hours. Both sides agreed the trial was going no longer than necessary. The judge did not want deliberation to occur on Christmas Eve. A judge may manage trials, and we do not intervene in the absence of the unreasonableness. See Daniel J. Hartwig Assocs., Inc. v. Kanner, 913 F.2d 1213, 1222 (7th Cir. 1990). Were we more willing to intervene, we would not do so here. The district court noted that the "time allotted to the plaintiffs has long expired, and I would normally have cut you off except that it

was cross-examination. The defendants still have less than an hour left." The briefs filed here by the Zahrans evidence the need to cabin their presentations, and all that Robin Zahran was prevented from doing was to testify in rebuttal about a document already in evidence. his lawyer admitted "it's in the record. I think it's pretty well in the record. I wanted to introduce the blow-up for the jury for closing argument." Once over the ground was enough here.*

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* The Zahrans make other arguments that are not clearly stated or properly developed. (a) The slurry tank was listed in the policy under the heading "Coverage F - Out buildings, $500 deductible" and insured for $40,000 with a separate premium of $75. The Zahrans contended that they sought to collect only for damage to a portable part of the slurry tank under the blanket coverage for unscheduled personal property. The district judge refused to permit opinion evidence that the part was personal property; the witness was not qualified to given such an opinion and it made no sense to have a separate listing and premium for the slurry tank if it was covered as unscheduled personal property. We do not see how a jury could infer fraud from the court's ruling or its refusal to accept the Zahran's interpretation of a contract.

(b) The Zahrans say they were victimized by opposing counsel who knowingly used the prejured testimony of an engineer who said there was no damage to the slurry tank. But the Zahrans had the opportunity to bring out the defects in the engineer's testimony and, even now, they fail to show how the testimony is perjured (as opposed to mistaken). They simply point to Exhibit Q which is 20 pages of documents and photographs by an adjuster and tell us, without analysis of the document, that this is the proof of perjury. We are not required to comb through these pages and speculate about what is or is

Finally, there is Frankenmuth's claim that the district court erred in not granting judgment in its favor and, instead, dismissing its counterclaim of misrepresentation, concealment or fraud without prejudice to file another action. The district court refused to enter judgment because Frankenmuth did not submit jury instructions or special interrogatories (even after the court requested that they be submitted) and did not litigate whether it was entitled to restitution for the amounts already paid out under the insurance policy. Federal Rule of Civil Procedure 49 says, in part, that when a court instructs a jury to special verdict or interrogatories and omits an issue of fact raised by the pleading or by the evidence, "each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury." Fed. R. Civ. P. 49 (A). Frankenmuth concedes it did not tender a separate instruction for its counterclaim. Frankenmuth, however, says the special written finding that "the Zahrans violated the policy

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not false. This is particularly so where the adjuster says in the Exhibit that the damage did not really show up on the photographs but, with the naked eye, "it does appear as if there has been a twisting effect." This is hardly such unequivocal proof of actual damage that it puts the lie to any contrary opinion. the matter also was not included in the motion for new trial.

(c) the Zahrans complain of late production of documents and a videotape, but cannot tell us which documents they mean or how they were prejudiced by the delay in production. These documents, discovered in another case, are not part of this record. Both the district court and this court have denied the Zahrans" motiors to supplement the record.

(d) A number of claims are made for the first time in their Reply Brief and will not be considered by us.

provision relating to misrepresentation, concealment or fraud by willfully concealing any material fact or circumstance concerning their insurance claim" is a finding as a matter of law that the entire policy is void and entitles Frankenmuth to restitution of the proceeds paid out on the policy. Frankenmuth points to another part of Rule 49 which permits a court to make a finding on the issue submitted or which deems the court "to have made a finding in accord with the judgment on the special verdict." Fed. R. Civ. P. 49(A) But the district court noted it would be unjust for Frankenmuth to get restitution based on misrepresentations, concealment or fraud on proofs of loss which were not required for the preliminary payments of $136,687.74*

"As a general rule, if the insurer pays a loss, being induced so to do by fraud, or by mistake as to the facts which, if it had knowledge thereof, would have been a sufficient defense in an action by the insured upon the policy, the money so paid may be recovered." 18 COUCH ET AL., COUCH ON INSURANCE 2d § 74:191 (REV. ED. 1983); 6 J. APPLEMAN & J. APPLEMAN, INSURNACE LAW AND PRACTICE § 3979 (Mistake) (1972). "[I] f an obligation procured by fraud is paid voluntarily with a full knowledge of the facts, the amount so paid cannot be recovered." 66 AM. JUR. 2D § § 116 E. 122 (Restitution and Implied Contracts) (1973). One could argue that, under these basic principles, Frankenmuth is not entitled to recoup monies paid out on the policy where it did so voluntarily with knowledge from its own experts and investigators of the actual property damage sustained and when, after suspecting fraud, it refused to make further payments. The Zahrans actually suffered some of the

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* The Zahrans also sought reimbursement of an additional $20,274 paid out of the policy

losses claimed, and it would appear just to compensate them for those loses. But Frankenmuth does not base its right to recover on equitable principles. Rather, it seeks restitution based on he plain language of the policy, and we should not be motivated solely by a yearning to see insureds who pay premiums and suffer actual loses collect insurance.*

Given that the jury found a violation of the clear policy provision voiding the entire contract where fraud exists, we can conclude only that the district court erred in denying Frankenmuth the benefit of its bargain and refusing to enter judgment in favor of Frankenmuth on its counterclaim. The Zahrans bargained for the policy and were on notice of the harsh penalties for fraud. They cannot now reasonably claim injustice form mere application of its terms. Moreover, there is very little point to requiring Frankenmuth to file a new lawsuit, the result of which is inevitable given that the only operative and contested fact has been found in its favor and against the Zahrans.

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* See American Home Fire Assurance Co. v. Juneau Store Co., 78 F.2d 1001, 1003 (7th Cir. 1935) ("court [interpreting Wisconsin Standard Fire Insurance Policy] should [] unhesitatingly act to prevent attempted frauds on the part of the insured" even though penalty of voiding entire policy is "heavy and seemingly harsh"). The Juneau court, however, could not enter judgment in insurer's favor because of inconsistent jury verdict. See also Tenore v. American & Foreign Ins. Co., 256 F.2d 791 (7th Cir. 1958) (following Juneau, court held insured could not recover any sum under Illinois policy where provision voided entire policy in case of fraud or false swearing, despite fact insurers did not pay out money and were not deceived by insured's claims).

The district court's order and judgment entered on the jury verdict in favor of Frankenmuth is AFFIRMED. The dismissal of

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF WICSONSIN**

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ROBIN ZAHRAN and
KAREN ZAHRAN,
Plaintiffs, Case No. 90-C-337

v.

FRANKENMUTH MUTUAL
INSURANCE COMPANY,
Defendant.

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**DECISION AND ORDER**

Robin and Karen Zahran, the plaintiffs in the above-captioned case have moved the court for an order granting them a new trial or, in the alternative, for judgment notwithstanding the verdict. See Federal Rules of Civil Procedure 50 & 59. In this action the plaintiffs have sued defendant Frankenmuth Mutual Insurance Company for breach of an insurance contract and for bad faith failure to pay certain casualty loss claims. On December 26, 1991, a jury returned a special verdict finding that the defendant is not liable to the plaintiffs because the plaintiffs made material misrepresentations in their insurance claims.

Having reviewed the evidence in the light most favorable to the defendant, the court concludes that the jury's verdict is not against the clear weight of the evidence. See M.T. Bonk Company v. Milton Bradley Company, 945 F.2d 1404, 1407 (7th Cir. 1991) (standard for new trial). Moreover, the trial was not unfair or infected by substantial error. Without weighting the evidence, the court finds that the verdict is supported by substantial evidence in the record. See Allen & O'Hara v. Barrett Wrecking, Inc., 898 F.2d 512, 515 (7th Cir. 1990) (standard for granting judgment notwithstanding verdict).

Therefore, the court will not grant a new trail or judgment notwithstanding the verdict.

Defendant Frankenmuth has moved the court for judgment on its counterclaim in which it alleges that the plaintiffs are liable to it for misrepresentation, concealment and fraud in connection with their insurance claim. The company seeks $181,912.74, plus interest, costs and attorney fees for its injuries.

Although Frankenmuth demanded a trial by jury on it counterclaim, it failed to submit jury instructions or special interrogatories on the issues raised--even after the court specifically requested that such instructions be submitted. Federal Rule of Civil Procedure 49 provides that if a party does not submit a special verdict question on a particular issue to the jury before the jury retires, that party is deemed to have waived the right of trial by jury on the omitted issued. After the verdict is returned, the court may make findings on the omitted issue. However, the Rule does not contemplate that the court would receive evidence and testimony and hear argument on an issue after the trial is concluded and judgment has been entered. As the plaintiffs point out the defendant did not litigate the issue of whether it is entitled to restitution for amounts already paid out under the insurance policy at issue, so the plaintiffs did not have an opportunity to present a defense. There is evidence in the record that no proof of loss was required for the preliminary payments. Defendant's letter to the plaintiffs, dated August 7, 1989, contains this statement: "As indicated above, these payments total $136,687.74. You will note that there is no Proof of Loss nor is there any release being required or requested for your negotiation of these drafts." In light of this statement the court believes that it would be unjust to enter judgment in favor of the defendant on the counterclaim. Consequently, the court will not grant judgment to the defendant, but will dismiss the counterclaim without prejudice.

## ORDER

For these reasons, the court ORDERS that the plaintiffs' motion for a new trial or, alternatively, motion for judgment notwithstanding the verdict (filed January 7, 1992) IS DENIED.

IT IS FURTHER ORDERED that Frankenmuth's motion for judgment on the counterclaim (filed January 3, 1992) IS DENIED without prejudice.

IT IS FURTHER ORDERED that the judgment entered in this action on December 27, 1991, shall be amended to provide that:

> This action came on trail before the Court and a jury, Honorable Thomas J. Curran, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,
>
> IT IS ORDERED AND ADJUDGED
>
> that the plaintiffs Robin Zahran and Karen Zahran take nothing, that their action is dismissed upon its merits, and that the defendant Frankenmuth Mutual Insurance Company recover of the plaintiffs its cots of action;
>
> IT IS FURTHER ORDERED AND ADJUDGED
>
> that the counterclaim of defendant Frankenmuth Mutual Insurance Company is dismissed without prejudice and without costs to any of the parties.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 27th day of February, 1992.

Thomas J. Curran
United States District Judge

insured under a group *life or disability insurance* policy has the same right to request a copy of any document [subject to] *specified in* par. [(c)] (b), *including the certificate.*

SECTION 5.631.11(1) (c) of the statutes is renumbered 631.11 (4m) (b) and amended to read:

631.11 *(4m)*(b) (title) [Signed application or enrollment form for group insurance certificate] *Statement or warranty.* No statement, representation or warranty made by or on behalf of a particular certificate holder under a group *life or disability insurance* policy affects the insurer's obligations under the certificate unless it is stated in the certificate, or in a written document signed by the certificate holder, a copy of which is supplied to the certificate holder or the beneficiary whose rights would be affected.

SECTION 6.631.11 (2) of the statutes is renumbered 631.11 (1) (b) (intro.) and amended to read:

631.11 *(1) (b)* (title) [Effect of] Misrepresentation or breach of affirmative warranty. *(intro.)* No misrepresentation [or] and no breach of an affirmative warranty, *that is made by a person other than the insurer or an agent of the insurer in the negotiation for or procurement of an insurance contract constitutes grounds for rescission of, or* affects the insurer's obligations under, the policy unless [the] *if a misrepresentation, the person knew or would have know that the representation was false, and unless any of the following applies:*

*1.* *The* insurer relies on [it] *the misrepresentation or affirmative warranty* is either material or [is] made with intent to deceive[, or unless the ]

2. *The* fact misrepresented or falsely warranted contributes to the loss.

SECTION 7.631.11 (3) of the statutes is amended to read:

631.11(3) EFFECT OF FAILURE OR CONDITION OR BREACH OF PROMISSORY WARRANTY. No failure

of a condition prior to [the] a loss and no breach of a promissory warranty *constitutes grounds for rescission of ,or* affects [the] *an* insurer's obligations under [the] *an insurance* policy unless it exists at the time of the loss and either

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Note: Italics indicate new material; brackets indicate deleted material

## PROCEEDINGS

ROBIN ZAHRAN, called as a witness herein by the Frankenmuth Mutual Insurance Company, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BRUCKER:

Q. Would you state your name for the record and spell your last name for the court reporter, please?

A. Robin Zahran, z-a-h-r-a-n

MR. BUCKER: May the record reflect this is the examination under oath of Robin Zahran taken pursuant to Frankenmuth Mutual Insurance Company, policy number FR 0423155 and also taken pursuant to agreement of the parties as far as switching - - changing dates by agreement of the parties. Is that correct, counsel?

MR. BURRELL: Right.

BY MR. BURCKER:

Q. Where do you live, Mr. Zahran?

A. 718 Acorn Hill Lane, Oak Brook, Illinois.

Q. How long have you lived there?

A. About 10 years.

Q. You live with your wife Karen and your four children?

A. That's correct.

Q. Is this a policy portion - - with a portion of the policy with Frankenmuth Mutual Insurance Company?

A. Yes.

Q. Okay. Could you please identify and circle in red the two barns that you referred to as what you claim is 75,000 and 25,000?

A. 151. (Complies.)

Q. Okay. For the record you have circled unit 151 - -

A. Let me just make sure. Just a minute. Yes.

Q. You have circled unit 151 and unit 154 on Exhibit No. 2; is that correct?

A. Yes.
Q. Okay. The 151 was the two frame two-story barn, 40 by 120; is that correct?
A. Yes.
Q. That's should be 100, not 120, but - - about 100. That should be 100.
Q. So it should be 100 rather than 120?
A. Now, your agent is the one who made the measurement, and when we start thinking about rebuilding it, we made the measurement at about 100, but your agent made the measurement.
Q. Who's the agent you're - -
A. Frankenmuth people came and made the measurement for all this.
Q. Okay. Do you know his name?
A. Frankenmuth insurance inspectors or agents came and measured the whole dimension. So these dimensions are your - your dimensions.
Q. When were they - - Before you took out the policy mean?
A. Yeah, before the policy was taken out.
Q. Okay
A. That's all.
Q. Is there a limit on the number one - - Strike that. Is there a limit of $75,000 on unit 151 which you have circled?
A. Yes.
Q. According to this policy here?
A. Yes.
Q. Okay. And is there a limit of 25,000 on the unit 154 which you have circled?
A. Yes.
Q. According to this policy here?
A. Yes.

Q. Okay. And is there a limit of 25,000 on the unit 154 which you have circled?
A. The milk house barn we call it.
Q. I'm going to show you what has been marked as Exhibit No. 1 at Mr. Finnell's exam under oath. Would you put in there in - - with your green pen, if you could, 151, where 151 is located and - -
A. Tell me what you want me to do.
Q. Just mark in there where the building 151 is located and mark in there where the building 154 is located.
A. Here's 151.
Q. Okay. And where's 154?
A. (Complies.)
Q. Okay. 154 is the - -
A. Milk house barn.
Q. - - what is referred to as the L. shape going out along with the milk house; is that correct?
A. That's correct, the milk house barn.
Q. Have you ever claimed 151 and 154 any other insurance claim?
A. Again, now we had the tornado damage, right. Is this what you're referring to?
Q. Yeah. All I'm asking you, have you ever claimed 151 on any other insurance claim?
A. Other than the tornado.
Q. Okay. You had a tornado in 1989; is that correct?
A. Yes, um-hum
Q. What date? What day of the month was that?
A. May 24. Who would forget a tornado?
Q. Have you ever claimed full coverage for 151 on your tornado claim?
A. Yes.

Q. When I say you claimed full coverage, you claimed the maximum limit under the policy of 75,000 for building 151 as a result of tornado damage; is that correct?

A. My memory does not bring me total, or you know, an idea

**UNITED STATES DISTRICT COURT**
**FOR THE**
**EASTERN DISTRICT OF WICSONSIN**

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ROBIN ZAHRAN and
KAREN ZAHRAN,

Plaintiffs, Case No. 90-C-337

v.

FRANKENMUTH MUTUAL
INSURANCE COMPANY,

Defendant.

---

Examination of Robin Zahran, otherwise than as a witness upon the trial, taken at the instance of the Defendant, taken pursuant to stipulation, before CHRISTINE A. MORAN, a Notary Public in and for the State of Wisconsin, taken pursuant to the Federal Rules of Civil Procedure, at the Kmiec Law Office, 3741 West National Avenue, Milwaukee, Wisconsin, on the 17th day of May, 1991, commencing at 1:10 p.m. and concluding at 5:05 p.m.

A. Okay. That's where you, Bob Burrell, Frankenmuth and everybody should have realised. You - - of all of them, you and Pat Harmon. We said you don't get paid twice, and you should be a witness in that because I spoke with you about it personally on the farm.

Q. What are you presently claiming as you sit here today? What is Robin and Karen Zahran presently claiming for damages to barn 151 against Frankenmuth Mutual Insurance Company?

A. Right now today we are claiming if the fire paid the 75, if it did not cause additional consequential losses, as you are aware of it, you were served with it, then it becomes a more different issue than the tornado. Remember

when that tornado was in - - this wasn't in. Tornado happened. This wasn't there.

Q. Okay.

A. You did not pay that in November, and at that time Mr. Burrell and I we were communicating on that and he informed you - -

Q. Okay.

A. - - of that. You are informed. You were talking with each other, so what's the big deal?

A. I'm following you okay.

A. Great. I love you.

Q. My next question - -

A. Go ahead.

Q. - - has anything changed now that the fire occurred regarding you claim for damages to 151?

A. Okay. Now, that's ere we are here. Your delay of the 151 on the fire, the way you handled it caused us additional consequential damage, and I believe you speak with the other attorney about it and that's where it is. So you have to deal with that in a separate issue. There are tow separate issues. There's more for you lawyers then. I stated I don't want to get paid twice for the same damage, that's - - period. The rest is your to take care of.

Q. Following your statement you just stated, if you had been paid $75,000 for barn 151 - -

A. Yes.

Q. - - would you still claim 75,000 for barn 151 under the tornado loss?

A. You see, you're taking a simplistic view of this thing because not being able to use the other barn with the milkhouse, with the consequential losses and loss of income is part of the whole scenario, and you have to

understand that, and it was explained to you personally, you and I at the farm.

Q. Let's try to break it down. redundant. I want to make this clear. According to that payment you were paid 75,000 for barn 151 for damages, okay?

A. go ahead.

Q. That's under the fire loss?

A. Yes.

Q. Does that fact that you've got a payment on the fire loss change your claim under the tornado Complaint for - - strictly just for barn 151?

A. You can't take - - okay. Strictly this payment, then what you have a deal with Mr. Kmiec about it and that has to be addressed. That has to be addressed. I stated that to you last July. Why you're playing dumb about it?

Q. I'm not playing dumb.

A. You are playing dumb.

Q. I'm putting it on the record so we know. That has to be addressed with Mr. Kmiec, right?

A. Right. Mr Burrell was instructed to address it with you also.

Q. There's been no amended complaint filed on your behalf in this case, the tornado loss?

A. Again, you have to deal with Mr. Burrell about it.

Q. Mr. Kmiec?

A. Now it's Mr. Kmiec. Before it was Mr. Burrell. Mr.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF WICSONSIN**

---

ROBIN ZAHRAN and
KAREN ZAHRAN,
Plaintiffs, Case No. 91-C-808
v.
FRANKENMUTH MUTUAL
INSURANCE COMPANY,
Defendant.

---

The deposition of ROBERT SPALDING called by the Plaintiffs for examination, pursuant to Order of Court, pursuant to the Federal Rules of Civil Procedure and the Rules of the Supreme Court pertaining to the taking of depositions, taken before Sheri L. Arendt, CSR, a notary public within and for the County of Cook and State of Illinois, at 10 South LaSalle Street, Suite 1600, Chicago, Illinois, on the 30th day of October, 1992, at 9:00 o'clock A.M.
Reported for
LAKE SHORE REPORTING SERVICE, By:
Sheri L. Ardent, CSR

trying to collect twice from an old policy and new policy?

A. I don't ever in my mind frame ever put it in terms of policies. I put it in terms of claims presented, proofs of loss presented, yes.

Q. Have I ever tried to collect twice?

A. Yes, I think you have.

Q. Okay. How do you base your statement?

A. My statement is based upon the fact that you submitted proofs of loss for barn 151 as a total loss twice.

Q. So as you sit here today, you re stating that I demanded payment twice form you, is that correct?
A. I am stating that you filed a sworn proof of loss presenting you legal claim under oath to the company for double payment to barn 151.
Q. When was that legal claim under oath came to you, sir?
A. You show me the document.
Q. Do you remember from memory?
A. The date that the - - which proof of loss are you referring to? the fire loss, yes.
Q. For another payment, is that correct?
A. For a total loss under the fire loss.
Q. Okay. So Robin Zahran expected to get paid $75,000 under one and another - - under the wind loss and another $75,000 under the fire loss, is that correct?
A. That's what your proofs of loss state, yes.
Q. Is this what your knowledge, sir?
A. That's what your proofs of loss that I am testifying to, the documents that you presented.
Q. Sir, I understand. To your knowledge, I am talking about to your knowledge, is this what your testimony today?
A. To my knowledge?
Q. Yes.

MR. FITZPATRICK: I am going to object to that question. He just testified - -

MR. ZAHRAN: His knowledge other than the proofs of loss.

A. You didn't ask me if there is other knowledge. still goes back to proof of loss, proofs of loss, claiming a total loss to barn 151 twice.

MR. ZAHRAN: Q. Now, misrepresentation, what did - -

A. What?

Q. Misrepresentation, what did Robin and Karen Zahran misrepresent to you, sir?

A. They misrepresented that they were entitled to be paid twice on the same barn.

Q. And as you sit here today, you have no doubt whatsoever that they demanded to be paid twice?

MR. FITZPATRICK: I am going to object on the basis of form. go ahead and answer.

THE WITNESS: A Well, it goes back to the proofs of loss. I have no doubt that they submitted two proofs of loss, each proof of loss claiming a total loss to the same barn.

MR. ZAHRAN: Q. Sir, my question is as you sit here today, your testimony today, you have no doubt whatsoever that they demanded to be paid twice for the same barn?

A. Absolutely no doubt.

Q. No doubt?

A. No doubt.

Q. Nobody told you otherwise, is that correct?

A. Nobody told me that they weren't or you weren't trying to, no

Q. Okay. Have you ever read anything different than that?

A. Read anything different?

Q. yes.

A. I don't think I did.

Q. Did you ever read Robin Zahran sworn testimony under oath?

A. No, I did not.

Q. You never did?

A. No, I did not read it.

Q. Were you present when Robin Zahran testimony was taken?

A. No.

Q. You were not?

A. No.

Q. Okay. Now, that concealment - - what did Robin Zahran conceal from you?

A. Robin Zahran and Karen Zahran concealed the fact that they were entitled to be paid twice.

FRANKENMUTH MUTUAL INSURANCE COMPANY
One Mutual Avenue - Frankenmuth, Michigan

October 9, 1989

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Robin or Karen Zahran
% Robert J. Doig
Attorney at Law
1301 West 22nd Street
Suite 714
Oak Brook, IL 60521

RE: Our Claim # 89-10267
Date/Loss 5/24/89
Policy # FR 0423155

Dear Robin or Karen Zahran:

We have received from you two papers which purport to be Proof of Loss under policy number FR 0423155 in connection with an alleged loss of 5/24/89.

We are hereby returning these documents to you and expressly rejecting them as a proper Proof of Loss since they do not comply with the provisions of your policy of insurance with the Frankenmuth Mutual Insurance Company.

Your attention is directed to the following defects in the purported Proof of Loss:

A Proof of Loss which was dated on the 25th of July 1989 has been subsequently superseded by subsequent Proof of

Loss which was received at the Home Office of Frankenmuth Mutual Insurance Company on the 11th of September 1989.

The reason for the rejection of the Proof of Loss received on September 11, 1989 include the following:

a) The items and amounts claimed are not validated or documented by any documentation.

b) The amounts claimed in many of the cases have already been paid.

c) Various articles claimeds are in amounts in excess of the applicable coverage.

Any other Proof of Loss that may be filed by you will be considered an entirely new document and will be accepted or rejected solely in connection with the matters and items contained therein. I would now like to address some of the issues that have arisen during our various phone conversations, issues that have been presented in some of the correspondence which you have forwarded to this office and which now remain a permanent part of our claim file to used as deemed necessary, and also the personal meeting that we had here at the Home Office of Frankenmuth Mutual Insurance Company on the 18th of September 1989. On the issue of the diesel tank and repair, my discussion with Uni-Pump leave me to believe that the amount originally allowed by Mr. Conway was correct.

The amount originally allowed on the chopper boxes in the amount of $5,000 is correct.

The claim for gutters is an amount as I explained to you at the time of our September 18, 1989 meeting had already been paid for and had been included in the various estimates that have been submitted.

The $2,000 in clean up charges was for clean up of contents and the correct amount allowed in view of the policy limits, which had previously been paid on Barn 153. The shingles, which you are claiming $3,900 for, again had already been paid for during the repairs to Barn 151.

The amount allowed for the ventilation system is very generous in view of the limits having already been paid on Barn 153 and $6,473.33 does represent a fair amount and has been paid. As far as the manure tank is concerned, Mr. Earl Wildenberg did not indicate that his estimate of $79,000 was necessarily what needed to be done in order to remedy any problems with the tank. This is to further advise that the tank in question is only covered for $40,000 and although you have made a claim for $15,000 for a pump, you have supplied no documentation to indicate that there is anything wrong with the pump and Mr. Wildenberg indicated that it does not need to be replaced. I have made arrangements for someone in your locale to reinspect the slurry tank to give us further insight on any problems, if any.

As for the $4,628 Brown Electric bill, as I advised you on September 18th, this amount had already been covered in the $100,000 payment for Barn 153.

The conveyor which you have referred to both in writing and at the time of our meting was not damaged according to our inspection.

You have submitted estimates for the replacement of 24 x 40 barn. As you are aware, in studying your policy, we do not insure a 24 x 40 barn, however, this in all likelihood was to be considered as a part of barn 151, which is the wooden two story barn. You have also submitted estimates for the removal and

the replacement of this barn. Our inspection of that barn, including the 24 x 40 addition, has convinced us that this barn can be repaired. As soon as I have the repair figures, I will supply them to you immediately, and I am obviously also willing to immediately pay you for the cost of these repairs.

You have also submitted estimates and made demand for payment for the removal and replacement of the roof of you 40 x 170 warming house. Our re-inspection of this barn leads us to believe that there is no damage which needs attention or repairing.

You have made further claim for additional cows which were allegedly destroyed in the tornado. You have supplied us with absolutely no documentation for these cows. May I remind you that we have already indemnified you in the amount of $4,000 for the death of four cows.

Let me assure you, Mr. Zahran that should I become in the possession of objective information which would require the further indemnification of yourself under the policy of insurance in question, that I will promptly do so.

In conclusion, Frankenmuth Mutual Insurance Company, in rejecting your purported Proofs of Loss, expressly reserves all of it's rights and defenses under the policy of insurance and does to in any way waive compliance with all the terms and conditions of the policy of insurance.

I did advise you at the time of our September 19, 1989 personal meeting of the various portions of your policy which referred to the appraisal section. We also discussed it by telephone on the 4th of October 1989. Should you wish to resolve any remaining conflicts that you feel exists between

yourself and the Frankenmuth Mutual Insurance Company, the appraisal section of the policy clearly explains and identifies the procedures that must be followed.

Either party to the insurance contract has a right to have remaining disputes resolved through appraisal.

Very truly yours,

Robert C. Spalding, C.P.C.C.
Property Claim Unit Manager
RCS/js
Dist. 10/5/89

FRANKENMUTH MUTUAL INSURANCE COMPANY
One Mutual Avenue - Frankenmuth, Michigan

October 18, 1989

Robin or Karen Zahran
% Robert J. Doig
Attorney at Law
1301 West 22nd Street
Suite 714
Oak Brook, IL 60521

RE: Our Claim # 89-10267
Date/Loss 5/24/89
Policy # FR 0423155

Dear Robin or Karen Zahran:

I am enclosing at this time a copy of the report and estimate as submitted by Mr. Orvil Krueger pursuant to the damage to both your wood two-story barn delineated as barn No. 151, and also as it pertains to damage to the warming barn or barn. No. 152.

As you can see if Mr. Krueger's observations, he does feel that part of the damage to your barn is not wind related and refers specifically to the situation where the barn is hanging over the sidewalk and also leaning endways. You can see in his observations the reason that he questions this.

Further, you can see where he is estimating that he can repair the wind damage to the wood two-story barn and also do some minor masonry work to the warming barn for a total of $5,274.00.

The remaining work for what Mr. Krueger feels is not wind damage, can be completed possibly for $1,000.00 if all he has to do is jack one side of the barn and possibly as much as $10,000.00 if he has to jack the entire end of the barn and anchor it together.

Although Mr. Krueger does not feel that the additional $1,000.00 or additional $10,000.00 is necessary to correct wind damage, in order to give you the benefit of the doubt, I am enclosing with this correspondence a draft in the amount of $6,274.00 to represent the $5,247.00 for wind damage to both the wooden two-story barn and the warming barn and also the $1,000.00 that may completely correct the other problems referred to.

You are free, of course, to hire anyone of your choice in order to have these repairs completed including, of courts, Mr. Krueger. It is, however, your responsibility to see that the repairs are made and Frankenmuth Mutual Insurance Company cannot undertake directly any repairs to your property.

I hope by now that we have had an inspection completed on your slurry tank and as soon as I receive the results of this inspection, I will be back in tough with you immediately.

Very truly yours,

Robert C. Spalding, C.P.C.U.
Property Claim Unit manager
RCS/cw
Dict. 10/16/89

November 2, 1989

Mr. Robert Spalding
Frankenmuth Mutual Insurance co.
One Mutual Ave.
Frankenmuth, Michigan 48787-001

RE: Robin and Karen Zahran
Claim No. 89-10267
Date of Loss 5/24/89
Policy # FR 0423155

Dear Mr. Spalding,

You have previously received from me the approval from Morton Builders, to restore the barns to their original condition as to before the tornado, in excess of $140,000.00 which does not include electrical work, block wall repair and extra charges to cap barn walls with concrete.

Since Mr. Orvil Krueger has submitted to G.A.B. and you a proposal contract to restore the barns to their original condition as to before the tornado for $5274.00, and there is no way the figure from Morton Builders comes close to Mr. Kruegers proposal, please fix the barns immediately as we are in the Winter season already and you secured a contract with Mr. Krueger to do so.

Again, I state that the building must be restored to their original condition as to before the tornado. Absolutely nothing less than that condition will be acceptable.

Sincerely,
Robin Zahran

PS Morton Builders will adjust the $140,000.00 because the actual sq. footage is greater than they originally based their appraisal on.

FRANKENMUTH MUTUAL INSURANCE COMPANY
One Mutual Avenue - Frankenmuth, Michigan

November 8, 1989

Robin or Karen Zahran
718 Acorn Hill Lane
Oak Brook, IL 60521

RE: Our Claim # 89-10267
Date/Loss 5/24/89
Policy # FR 0423155

Dear Robin or Karen Zahran:

With this correspondence I will confirm receipt of two faxed letters both under the cover of November 2, 1989 on this particular matter.

In regard to the question of appraisal, I am enclosing with this correspondence photo copies of the Appraisal Section of your policy. As you can see, demands for appraisal must be made in writing and, likewise, the naming of the appraiser must be in writing.

As I have explained to you in the past, it is the position of Frankenmuth Mutual Insurance Company that they have idenmified you for your loss of May 24, 1989. Should you disagree with the indemnification received, as has been pointed to you both personally and in writing in the past, the policy does have an Appraisal Section to which you may turn in an attempt to try to resolve remaining differences.

Accordingly, should you disagree with the amount of indemnification that you have received, please advise Frankenmuth Mutual Insurance Company in writing of your wish or demand for appraisal and also advise us of your appraiser. We will then respond accordingly pursuant to the contract.

As to the issue on Barn No. 151, you were advised under cover of October 18, 1989 of exactly what was wrong with your barn both of a wind and nonwind nature and also advised in writing of what should be done to correct and rectify the situation. It is now your responsibility to see that what is necessary to repair the barn in question is done as quickly as possible. Failure to do so should further damages occur and should these damages arise out of your failure to have the repairs made as delineated could seriously jeopardize your insurance coverage. You have also been paid to have these repairs done.

As has also been explained to you previously, Frankenmuth Mutual Insurance Company does not undertake repairs. Our contractual obligations to you are to indemnify you for loss. We do not, however, undertake direct repairs to damaged property. That remains your responsibility. Neither Frankenmuth Mutual Insurance Company nor the General Adjustment Bureau has entered into any contract for repairs with Mr. Orvil Krueger. Mr. Krueger's proposal was submitted to the General Adjustment Bureau.

You have advised me that Mr. Krueger does not wish to repair your barn. I am sure there are other barn repair people who may be interested in repairing your barns along the lines that Mr. Krueger has proposed. As I am sure you are aware, the previous proposals that you have given us from the Morton people have nothing to do with repairing your barns but simply

to rebuild new barns. In view of an experienced barn builder's opinion on repairs such as Mr. Krueger has given us, the Morton proposals are unacceptable. I am also convinced that Mr. Krueger's proposals in regards to the repairs of your barns is legitimate and will stand up to any technical scrutiny.

I will trust that that makes our position clear.

Very truly yours,

ROBERT C. SPALDING, C.P.C.U.
Property Claim Unit Manager
RCS/cw
Dict. 11/6/89

THOMAS W. GOOCH & ASSOCIATES
ATTORNYES AT LAW
209 SOUTH MAIN STREET
WAUCONDA, ILLINOIS 60084
(708) 526-0110
August 9, 1996

Mr. John H. Bickley
Bickley & Bickley
Carbon & Carbide Building
230 N. Michigan Avenue
Chicago, Illinois

Re: Zahran v. Schmidt, et al.
95 C 0334

Dear John:

This letter constitutes my opinion at the present time regarding the issues raised in your malpractice action by Robin and Karen Zahran. The opinion may be modifiable or subject to supplementing it upon receipt of further documents relating to the underlying cause of action. My opinion to date is based on an examination of the jury instructions submitted in the underlying cause of action, an interview with Robin Zahran, the pleadings in the underlying cause of action to the extent I have received them, and the transcripts prepared in the underlying cause of action to the extend they were furnished me.

First, I am of the opinion, with a reasonable degree of legal certainty, that an irreconcilable conflict of interest arose during the representation of both Robin Zahran and Karen Zahran by the defendants. This conflict arose when the defendants first became aware that the insurance company was raising

allegations of fraud and misrepresentation by Robin Zahran in the preparation of his various loss documents. Due to the existence of the "innocent spouse rule" in the state of Wisconsin, representation by the same attorneys of both Robin and Karen Zahran became impossible when fraud allegations were raised by the insurance company in the underlying cause of action. Rather than withdrawing from representation of either of the Zahrans, the defendants continued to represent both of the Zahrans could not in any way reconcile the conflicts between Robin Zahran and Karen Zahran due to the innocent spouse rule. At the time the insurance company raised the fraud and misrepresentation issues, Karen Zahran had an absolute defense to those issues and should have been represented by a different attorney. By continuing to represent both Robin Zahran and Karen Zahran, the defendant attorneys in this cause ignored the defenses that she had as a co-insured and concentrated their efforts on the defense of Robin Zahran resulting in no recovery whatsoever by Karen Zahran.

Secondly, I am of the opinion with a reasonable degree of legal certainty, that the defendant attorneys failed to plead and prove that the insurance company in the underlying cause of action relied on the representations of Robin Zahran. The record is devoid of any discovery undertaken by the defendant attorneys on behalf of Robin Zahran to prove that the insurance company actually relied on the statements of Robin Zahran to its detriment. It appears from my review of the record that the insurance company had rejected Robin Zahran's estimates and conducted their own investigation into the actual losses suffered by him. Therefore, it would appear that the insurance company at no time relied on the statements of Robin Zahran and therefore, could not raise his misrepresentations as a defense to payment. I believe that he defendant attorneys failed to exercise the proper standard of care, skill and knowledge in their

representation of Robin Zahran by failing to raise this issue prior to trial or at trial.

Furthermore, at no time did the defendant attorneys timely offer jury instructions on the subject of reliance, nor did the defendant attorneys take any actions to attempt a dismissal of the countercomplaint filed by the insurance company based on reliance.

Finally, the defendant attorneys submitted no special interrogatories on the subject of reliance.

I believe with a reasonable degree of legal certainty, and am of the opinion that all of the afore stated omissions by the defendant attorneys constitute a breach of the care, skill and knowledge they owed Robin Zahran on the issue of reliance. The actions of the defendant attorneys in attempting to tender a tardy jury instruction/special interrogatory to the court for submission to the jury, well after the jury was charged and while they jury was deliberating, would indicate that the defendant attorneys recognized their error and attempted to remedy it, however that remedy came far too late to be of any assistance to the Zahrans.

Thirdly, I am of the opinion with a reasonable degree of legal certainty, that the defendant attorneys further breached their duty of care, skill and knowledge owed to Robin and Karen Zahran by failing to preserve the following issues for appeal: first, the innocent spouse issue was not properly preserved; secondly, an issue of estoppel under which the insurance company should have been estopped from asserting much of the arguments contained in their countercomplaint was never preserved for appeal; and, thirdly, the issue of reliance on the

alleged misrepresentations of Robin Zahran was never preserved for appeal.

There are numerous other issues which I believe constitute recognizable malpractice by the defendant attorneys as defined by their failure to use the care, skill and knowledge of similar attorneys in the fact situation of the underlying cause. They include:

a. The failure to file appropriate motions *in liminie* to prevent the insurance company in the underlying cause of action from introducing evidence to other losses suffered by Robin Zahran whereby he made claims against the insurance policy. From a review of the opening statement and closing argument, it would appear that the attorneys representing the insurance company argued through implication and otherwise that Robin Zahran was responsible for the fire previously occurring on one of the barns on the subject property. This situation obviously aggravated the jury and resulted in the verdict which was returned. Again, this issue also pertains to the conflict issue, as separate representation of Karen Zahran would have resulted in her isolation from this situation;

b. At no time did the defendant attorneys ever inquire of Robin Zahran or introduce proof as to how he arrived at the figures in his proof of loss. Further, the defendant attorneys at no time elicited from Robin Zahran, or through other evidence, introduced proof that Robin Zahran was in the state of Illinois when the insurance company in the underlying cause of action sent a contractor to his property to do the estimates. This would directly refute the allegations that Robin Zahran attempted to influence that contractor at the time of his estimates;

c. There appear to be numerous instances of conflicting testimony the expert retained by the insurance company to testify in the underlying cause of action, and there was no impeachment of those conflicts through the use of previously-given depositions.

I, therefore, am of the opinion with a reasonable degree of legal certainty, that the defendant attorneys failed to exercise a reasonable amount of care, skill and knowledge in their representation of Robin Zahran and Karen Zahran and breached their duty to the Zahrans by that failure, all as set forth above. Obviously, I would like to continue reviewing documents generated in the underlying cause of action and this opinion is subject to being supplemented upon that review.

Respectfully submitted,

Thomas W. Gooch III,
Attorney at Law
TWG:mlf

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604

**Date: August 7, 1998**
**By the Court:**
No. 97-3710

ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs-Appellants

v.

GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KEIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,
Defendants - Applies

Appeals from the United States District Court for the Eastern District of Wisconsin
No. 95 C 334, Charles N. Clevert, Judge

Upon consideration of the **STATUS REPORT** filed on August 7, 1998, by counsel for the appellants,

**IT IS ORDERED** that counsel file a further status report by 8/28/98.

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
September 22, 1998

*By the Court:*

| | |
|---|---|
| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants, | )<br>)Appeal from the United<br>)States District Court for |
| No. 97-1712 and 98-2123 | )the Eastern District of |
| v | )Wisconsin |
| GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., | )<br>)<br>) No. 95 C 334<br>)<br>)<br>)<br>)Charles N. Clevert<br>) Judge<br>)<br>) |
| Defendants-Appellees | ) |

The following are before the court:

1. **MOTION FOR AN EXTENSION OF TIME TO FILE THE BRIEF AND APPENDIX OF THE APPELLANTS,** filed on September 11, 1998, by counsel.

21 **MEMORANDUM IN OPPOSITION TO PALINTIFF-APPELLANTS' SEVENTH MOTION FOR AN EXTENSION OF TIME TO FILE THE BRIEF AND APPENDIX OF THE APPELLANTS DATED SEPTEBMER 11, 1998,** filed on September 21, 1998, by counsel.

**IT IS ORDERED** that briefing in these appeals will proceed as follows:

1. The brief and required short appendix of the appellants are due no later than October 23, 1998.

2. The brief of the appellees is due November 23, 1998.

3. The reply brief of the appellants, is any, is due December 7, 1998.

Appellants are advised that no further extensions of time will be allowed and that failure to file a brief by this due date will result in dismissal of the appeals for failure to prosecute.*

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* Note: The parties are advised that Rule 26(c), Federal Rules of Appellate Procedure, which allows for three additional days after service by mail, shall not apply when the due dates or briefs are specifically set by order of this court. All briefs are due by the dates ordered.

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
October 6, 1998

*By the Court:*

| | |
|---|---|
| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants, | )<br>)Appeal from the United<br>)States District Court for |
| No. 97-1712 and 98-2123 | )the Eastern District of |
| v | )Wisconsin |
| GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., | )<br>)<br>) No. 95 C 334<br>)<br>)<br>)<br>)Charles N. Clevert<br>) Judge<br>)<br>) |
| Defendants-Appellees | ) |

Briefing in these matters remains suspended pursuant to this court's order of September 17, 1998, in appeals no. 97-1712 and 98-1905.

The court, on its own motion, **VACATES** the briefing schedule set out in its order of September 22, 1998.

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
December 22, 1998
Before
Hon. **William J. Bauer**, Circuit Judge
Hon. **Joel M. Flaum**, Circuit Judge
Hon. **Michael S. Kanne**, Circuit Judge

| | |
|---|---|
| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants, | )Appeal from the United |
| No. 97-1712 | )States District Court for |
| v. | )the Eastern District |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, | )of Wisconsin |
| Defendant-Appellee. | ) No. 90 C 337 |
| | )Thomas J. Curran, |
| | ) Judge |
| ROBIN ZAHRAN and KAREN ZAHRAN | ) |
| Plaintiffs-Appellants, | )Appeal from the United |
| | )States District Court |
| | )for The Eastern District |
| 97-3710 & 98-2123 | )of Wisconsin. |
| v. | ) |
| GERALD G. SCHMIDT, JR., individually and the law firm of | ) |
| SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, | ) No. 95 C 334 |
| individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, | )Charles N. Clevert, |
| individually and the law firm of BORGELT, POWELL, PETERSON | ) Judge |

& FRAUN, et al., )
Defendants-Appellees )

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ROBIN ZAHRAN and )
KAREN ZAHRAN, )Appeal from the United
Plaintiffs-Appellants, )States District Court for
)the Eastern District of
No. 97-3813 & 98-2122 )Wisconsin.
v. )
)
CLEARY BUILDING )
CORPORATION, ) No. 93 C 543
Wisconsin Corporation, and )
RALPH UECKER AND SONS, )
INCORPORATED, )Charles N. Clevert,
Defendants-Appellees ) Judge

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Upon consideration of the **EMERGENCY MOTION TO INTERVENE AND TO AMEND PLAINTIFFS-APPELLANTS' BRIEFS FILED ON AUG. 7, 1998, CEC. 4, 1998, DEC. 15, 1998 AND DEC. 16, 1998, REFERENCING THE ABOVE APPEALS. BASED ON APPELLANTS COUSEL INADEQUACY, LACK OF PREPARATION, FRAUD, AND MISREPRESENTIONS AND THE FILING OF INADEQUATE BRIEFS,** filed on December 18, 1998, by the pro se appellants,

**IT IS ORDERED** that the motion is **GRANTED.** Appellants are hereby **GRANTED** leave to file supplemental briefs in these matters, which briefs shall not exceed 7,000 words, pursuant to Fed. R. App. P. 32(a) (7) (B) (i).

Briefing is these matters shall proceed as follows:

1. Appellants' supplemental brief in No. 97-1712 shall be filed by January 4, 1999.

2. Appellants' supplemental brief in Nos. 97-3710 and 98-2123 shall be filed by January 11, 1999.

3. Appellants' supplemental brief in Nos. 97-3813 and 98-2122 shall be filed by January 19, 1999.

4. Appellees' in No. 97-1712 shall file their response brief by February 4, 1999.

5. Appellees' in Nos. 97-3710 and 98 2123 shall file their response brief by February 11, 1999.

6. Appellees' in Nos. 97-3813 and 98-2122 shall file their response brief by February 19, 1999.

7. Appellants' in No. 97-1712 shall file their reply brief, if any, by February 18, 1999.

8. Appellants' in Nos. 97-3710 and 98-2123 shall file their reply brief, if any, by February 25, 1999.

9. Appellants' in Nos. 97-3813 and 98-2122 shall file their reply brief, if any, by March 5, 1999.

Appellants are advised that their supplemental briefs must be received by the clerk of this court by the aforementioned due dates or they will not be filed in. The parties are advised that further motions for extensions of time will not be entertained.

Note: The parties are advised that rule 26(c), Federal Rules of Appellate Procedure, which allows for three additional days after service by mail, shall not apply when the due dates of briefs are specifically set by order of this court. All briefs are due by the dates ordered.

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
December 29, 1998

By the Court:

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|---|---|
| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants, | )<br>)Appeal from the United<br>)States District Court for |
| No. 97-1712 v. | )the Eastern District<br>)of Wisconsin |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee. | )<br>) No. 90 C 337<br>)<br>) Thomas J. Curran,<br>) Judge |
| ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants, | )<br>)Appeal from the United<br>)States District Court for<br>)The Eastern District of |
| 97-3710 & 98-2123 v. | )Wisconsin. |
| GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees | )<br>)<br>) No. 95 C 334<br>)<br>)Charles N. Clevert,<br>) Judge |

| | |
|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, | )Appeal from the United )States District Court for )the Eastern District of |
| No. 97-3813 & 98-2122 v. | )Wisconsin. ) ) |
| CLEARY BUILDING CORPORATION, Wisconsin Corporation, and RALPH UECKER AND SONS, INCORPORATED, | ) No. 93 C 543 ) ) |
| Defendants-Appellees | )Charles N. Clevert, ) Judge ) |

Upon consideration of **APPELLANTS EMERGENCY MOTION TO COMPEL THE TURN OVER OF APPELLANTS FILES THAT ARE IN THE POSSESSION OF ATTORNEY COHEN TO APPELLANTS**, filed on December 29, 1998, by counsel,

**IT IS ORDERED** that the motion is **DENIED.**

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
January 6, 1999

By the Court:

| | |
|---|---|
| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants, | ) )Appeal from the United )States District Court for |
| No. 97-1712 v. | )the Eastern District )of Wisconsin |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee. | ) ) No. 90 C 337 ) ) Thomas J. Curran, ) Judge |
| ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants, | ) )Appeal from the United )States District Court for )The Eastern District of |
| 97-3710 & 98-2123 v. | )Wisconsin. ) |
| GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees | ) ) ) ) No. 95 C 334 ) )Charles N. Clevert, ) Judge ) ) ) ) ) ) |

| | | |
|---|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, | ) | Appeal from the United States District Court for the Eastern District of Wisconsin. |
| No. 97-3813 & 98-2122 v. | ) | |
| CLEARY BUILDING CORPORATION, Wisconsin Corporation, and RALPH UECKER AND SONS, INCORPORATED, | ) | No. 93 C 543 |
| | ) | Charles N. Clevert, Judge |
| Defendants-Appellees | ) | |

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The following is before the court:

1. **EMERGENCY MOTION FOR EXTENSION OF TIME BY 11 DAYS OR UNTIL JANUARY 22, 1999, IN APPEAL NO. 97-3710 & 98-2123,** filed on December 30, 1998, by counsel for appellants.

2. **EMERGENCY MOTION TO FILE AN EVERSIZED SUPPLEMENTAL BRIEF TO THE EXTENT OF 12,000 WORDS IN APPEAL NOS. 97-3710 & 98-2123 AND 97-3813 & 98-2122,** filed on December 30, 1998, by counsel for the appellants.

3. **PLAINTIFFS-APPELLANTS' MOTION TO FILE INSTANTER APPELLANTS SUPPLEMENTAL BRIEF,** filed on January 7, 1999, by counsel for appellants.

**IT IS ORDERED** that #1, #2, and #3 are **DENIED.**

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
January 14, 1999

*By the Court:*

| | |
|---|---|
| ROBIN ZHARAN and | ) |
| KAREN ZAHRAN, | )Appeal from the United |
| Plaintiffs-Appellants, | )States District Court for |
| No. 97-1712 and 98-2123 | )the Eastern District of |
| v | )Wisconsin |
| GERALD G. SCHMIDT, JR. | ) No. 95 C 334 |
| ROBERT C. BURRELL, COREGIS | )Charles N. Clevert, |
| INSURANCE COMPANY, et al., | )Judge |

Upon consideration of the **MOTION TO FILE INSTANTER APPELLANT'S UNTIMELY SUPPLEMENTAL BRIEF**, filed on January 12, 1999, by the pro-se appellant Robin Zahran,

**IT IS ORDERED** that the motion is **DENIED.**

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
January 26, 1999

*By the Court:*

| | | |
|---|---|---|
| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants, | ) | Appeal from the United States District Court for the Eastern District of Wisconsin |
| No. 97-1712 and 98-2123 v | ) | |
| GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees | ) | No. 95 C 334 |
| | ) | Charles N. Clevert Judge |

Upon consideration of the **MOTION TO RECONSIDER DENIAL OF APPELLANTS' MOTION TO FILE SUPPLEMENTAL BRIEF INSTANTER,** filed on January 16, 1999, by the pro se appellants,

**IT IS ORDERED** that the motion is **DENIED.**

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604

**Date: February 25, 1998**
**By the Court:**
No. 97-3710 & 98-2123

ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs-Appellants

v.

GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KEIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,
Defendants - Appellees

Appeals from the United States District Court for the Eastern District of Wisconsin
No. 95 C 334, Charles N. Clevert, Judge

Upon consideration of the **MOTION FOR LEAVE TO FILE APPELLEES' BRIEF INSTANTER** filed on 2/24/99.

**IT IS ORDERED** that the motion is **GRANTED** and the clerk of this court is directed to file instanter the tendered copies of the brief of the appellees.

The reply brief of the appellants, if any, is due by 3/11/99.*

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* Note: The parties are advised that Rule 26(c), Federal

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604
March 4, 1999

By the Court:

| | | |
|---|---|---|
| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants, | ) | |
| | )Appeal from the United States District Court for the Eastern District of Wisconsin | |
| No. 97-1712 v. | | |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee. | ) | No. 90 C 337 |
| | ) | Thomas J. Curran, Judge |

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| | | |
|---|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants, | ) | |
| | )Appeal from the United States District Court for The Eastern District of Wisconsin. | |
| 97-3710 & 98-2123 v. | | |
| GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT | ) | No. 95 C 334 |

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Rules of Appellate Procedure, which allows for three additional days after the service by mail, shall not apply when the due dates of briefs are specifically set by order of this court. All briefs are due by the dates ordered.

| | | |
|---|---|---|
| C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees | ) | Judge C. Clevert |
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, No. 97-3813 & 98-2122 v. CLEARY BUILDING CORPORATION, Wisconsin Corporation, and RALPH UECKER AND SONS, INCORPORATED, Defendants-Appellees | ) | Appeal from the United States District Court for the Eastern District of Wisconsin. |
| | ) | No. 93 C 543 |
| | ) | Charles N. Clevert, Judge |

Upon consideration of the **PLAINTIFFS-APPELLANTS' MOTION TO MOVE THE COURT AND HONORABLE JUDGES BAUER, FLAUM, AND KANNE TO TRANSFER THE FOLLOWING APPELLANTS' APPEALS DISPOSITION TO ANOTHER CIRCUIT FOR RULING OR IN THE ALTERNATIVE FOR THE ABOVE NAMED NOS.** 97-1712, 97-3710, 98-2123, 97-3813 & 98-2122

**JUDGES TO ABSTAIN FROM PARTICIPATING IN THE DETERMINATION OF THESE APPEALS DUE TO PRIOR DISCLOSURE,** filed on March 1, 1999, by the prose appellants,

**IT IS ORDERED** that #1 is **DENIED.**

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
JUDGEMENT - WITHOUT ORAL ARGUMENT

Date: April 14, 1999
BEFORE: Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANE, Circuit Judge

Nos. 97-3710, 98-2123 & 99-1780

ROBIN ZAHARN and KAREN ZAHRAN
Plaintiffs-Appellants,
v.
GERALD G. SCHMIDT, JR., individually, and the law firm of SCHMIDT, DARLING & ERIN, MARJAN R. KMIEC, individually and the law from of KMEIC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,
Defendants - Appellees

Appeals from the United States District Court for the Eastern District of Wisconsin
No. 95 C 334, Charles N. Clevert, Judge

The decisions of the District Court are AFFIRMED, with costs, as to appeal Nos. 97-3710 and 98-2123. Robin and Karen Zahran are directed under Rule 38 to show cause within 14 days why they should not be sanctioned for filing a frivolous appeal. As to appeal No. 99-1780, the post-judgement decision of the District Court awarding costs and fees to the defendants is summarily AFFIRMED, with costs. The above is in accordance with the decision of this court on this date.

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Unpublished order not to be cited per Circuit Rule 53

Submitted March 10, 1999*
Decided April 14, 1999
Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANE, Circuit Judge

| | |
|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, No. 97-3710, 98-2123, 99-1780 v. GERALD G. SCHMIDT, JR., individually, and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees. | )Appeals from the United States District Court for the Eastern District of Wisconsin. No. 95 C 334 Charles N. Clevert, Judge |

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary and the appeal is submitted on the briefs and record. *See* fed. R. App. P. 34(a)(2).

ORDER

Robin and Karen Zahran own a diary farm in Wisconsin. In 1989 and 1990, property at their farm was damaged, first by a tornado, and later by a series of fires. The Zahrans filed claims with their insurer, Frankenmuth Mutual Insurance Co. ("Frankenmuth"), but when Frankenmuth declined to pay in full, the Zahrans filed suit against the company alleging bad faith and breach of contract. The insurer countersued for fraud, concealment, and material misrepresentation, seeking to recover money already paid out on the claims. Following a jury trial and cross-appeals, this court entered an order affirming the verdict against the Zahrans on their breach of contract and bad faith claims, and remanded the case with instructions to enter judgement in favor of Frankenmuth on its counterclaim. *See Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 92-1778 & 92-1848, 1994 WL 107909 (7th Cir. Mar. 28, 1994) ("*Zahran I*") (unpublished disposition), *cert. denied*, 513 U.S. 1083 (1995).*

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* The full history of this litigation has been set out elsewhere at some length and need not be recounted here. *See Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-1712, 97-3710, 98-2123 & 98-1905, 1998 WL 975094 (7th Cir. Nov. 4, 1998); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-1712 & 98-1905, 1998 WL 975072 (7th Cir. Sept. 17, 1998); *Zahran v. Frankenmuth Mut. Ins. Co.*, 95-2588 & 96-2270, 1997 WL 205381 (7th Cir. Apr. 22, 1997); *Zahran v. Frankenmuth Ins. Co.*, No. 93-2853, 1995 WL 241392 (7th Cir. Apr. 25, 1995), *cert denied*, 516 U.S. 945 (1995); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 92-1778 & 92-1848, 1994 WL 107909 (7th Cir. Mar. 28, 1994), *cert. denied*, 513 U.S. 1083 (1995); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 94 C 4827, 1997 WL 53107 (N.D. Ill. Feb. 06, 1997); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 94 C 4827, 1996 WL 446891 (N.D. Ill. Aug.

Dissatisfied, the Zahrans then filed a malpractice action against the attorneys who had handled their suit against Frankenmuth. Following a bench trial, the court dismissed all claims against the defendants and entered judgement and costs against the Zahrans on a contract claim filed by their former trial attorney. Though the Zahrans raise a number of issues on appeal, only two warrant extended discussion. For the reasons set forth below, we affirm the decisions of the district court.

As a preliminary matter, jurisdiction in this case based on the diversity statute: defendant attorneys and firms of which they are members or partners are citizens of the state of Wisconsin, the Zahrans are citizens of Illinois, and the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332. During the course of litigation, the Zahrans filed a third amended complaint in which they named as additional defendants the attorneys' liability insurers, one of which is a citizen both of Indiana, where it is incorporated, and of Illinois, the state of its principal place of business. *See id.* § 1332(c)(1); *Krueger v. Cartwright*, 996 F.2d 928, 931 (7th Cir. 1993). (R.132.) Because jurisdiction is determined at the time the plaintiff's well-pleaded complaint is filed, *see Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426 (1991), and because the insurer was not an indispensable party at the time the action was commenced, *see Howell v. Tribune Entertainment Co.*, 106 F.3d 215, 217-18 (7th Cir. 1997); *Whalen v. Carter*, 954 F.2d 1087, 1095-96 (5th Cir. 1992), the Zahrans addition of a non-diverse defendant two years into the litigation did not destroy the basis of jurisdiction.

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2, 1996); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 94 C 4827, 1996 WL 182563 (N.D. Ill. Apr. 15, 1996); *Zahran v. Frankenmuth Mut. Ins. Co., No. 94 C 4827, 1995 WL 535088 (N.D. Ill. Sept. 5, 1995).*

Under Wisconsin law, which applies here, *see Kuehn v. Childrens Hosp.*, 119 F. 3d 1296, 1300-01 (7th Cir. 1997); *Hunker v. Royal Indem. Co.*, 204 N.W. 2d 897, 901-04 (Wis. 1973), a plaintiff attempting to establish legal malpractice must demonstrate in relevant part that former counsel's professional conduct fell below a standard of reasonable care. Expert testimony is required to establish that standard unless the alleged conduct or omissions do not involve legal expertise, thereby falling within the realm of ordinary experience, or are so gross as to be improper as a matter of law. *See Olfe v. Gordon*, 286 N.W. 2d 573, 576-77(Wis. 1980); *see also* Wis. Stat § 907.72 (West 1998); *Helmbrecht v. St. Paul Ins. Co.*, 362 N.W. 2d 118 9Sic. 1985); *Lewandowski v. Continental Cas. Co.*, 276 N.W.2d284 (Wisc. 1979). Whether counsel has breached the standard of care is a mixed question of law and fact, to be determined based on the particular circumstances of each case, though as a practical matter the challenged conduct usually cannot be found improper solely as a matter of law. *See Helmbrecht*, 362 N.W.2d at 128.

In this case, the Zahrans contend that former counsel breached the standard of skill, care, and knowledge of reasonably prudent Wisconsin attorneys by failing variously: to conduct pre-trial discovery on the subject of Frankenmuth's alleged racism and its participation in a conspiracy against the Zahrans; to submit certain motions *in limine* or to move for summary judgement on Frankenmuth's counterclaim; to argue non-reliance by Frankenmuth on the Zahrans' fraudulent proof of loss statements; to treat Robin and Karen Zahran as separate insureds in order to permit Karen to assert an "innocent insured" defense and to submit jury instructions on the issues of reliance and the innocent insured rule. Because none of these purported errors represents a matter within the realm of ordinary experience (thereby eliminating the need for legal expertise) or is so gross as to be improper as a matter of law,

the Zahrans were required to present expert testimony. Unfortunately for the Zahrans, the district judge, who correctly characterised their expert's testimony as the "linchpin" of their case, found their expert unworthy of belief. As a consequence, the court concluded not merely that the Zahrans had failed to present sufficient proof to sustain their claims, *see Cramer v. Theda Clark Mem'l Host.*, 172 N.W.2d 427,429 (Wis. 1969), but that the evidence adduced at trial positively refuted those claims, including their innocent insured and reliance arguments.

The district judge found that the testimony of the Zahrans' expert witness should be accorded little weight because the "expert" was not, nor had he ever been, admitted to practice either in the state of Wisconsin or in its federal district courts; had never testified as an expert witness in a legal malpractice action; had retained local counsel on those few occasions when he represented clients in Wisconsin; did not hold himself out as an expert on insurance policies; was unfamiliar with and, indeed, affirmatively misapplied, relevant Wisconsin law pertaining to insurance coverage and the appropriate standard of care; failed to show that either Robin or Karen Zahran had been prejudiced by any of former counsels' purported errors; and was testifying in large measure because of his close personal friendship with the attorney representing Karen Zahran in the malpractice action. The district court's findings in this regard are abundantly supported by the record, and we will not reverse its credibility determinations absent extraordinary circumstances. *See Etter v. J. Pease Constr. Co.*,963 F.2d 1005, 1011-12 (7th Cir. 1992). Similarly, because we cannot say either that the court misapplied the law or abused its discretion in limiting the scope of discovery or by excluding irrelevant testimony from other witnesses, we find no reason to disturb the malpractice judgement. *See, e.g., Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1052-53 (7th Cir. 1998); *In re Sheridan*,57 F.3d 627, 634-35 (7th Cir. 1995).

The Zahrans next contend that the district court erred in awarding a $20,000 judgement against them on a counterclaim brought by their trial attorney. *See* Fed. R. Civ. P. 13(a),(f); *Iglesias v. Mutual Life Ins. Co.*, 156 F.3d 237, 241-43 (1st Cir. 1998); *Valley Disposal Inc. v. Central Vt. Solid Waste Mgt. Distr.*, 113 F.3d 357,364-65 (2d Cir. 1997). During the course of the original storm damage trial, Frankenmuth offered the Zahrans $110,000 to settle the case. The Zahran's attorney urged his clients to accept the offer but his advice was rejected. Instead, Robin Zahran gave trial counsel a signed, hand-written note promising to pay $20,000, win or lose, to try the case to judgement and to cease further settlement discussion. Without citation to the record or to relevant authority, and without any elaboration, the Zahrans now suggest that their mid-trial modification of the terms of counsel's original contract is void for want of consideration. Their contentions are unavailing. It is settled in Wisconsin that a valid contract - here, trail representation based on a contingency fee plus costs secured by a non-refundable retainer - may be modified by consent of the parties without additional consideration. *See Everlite Mfg. Co. v. Grand Valley Mach. & Tool Co.*, 171 N.W.2d 188, 190 (Wis. 1969). The Zahrans' suggestion that Robin's signature did not bind Karen to the modification is also unsupported by the record, as the district court correctly concluded. *See Lakeshore Comm'l Fin. Corp. v. Drobac*, 319 N.W. 2d 839, 845-46 (Wis. 1982); *Smith v. Osborn*, 223 N.W. 2d 913, 919-21 (Wisc. 1974). Furthermore, to the extent that the Zahrans' two sentence contract avoidance "argument" can be construed as an attempt to invoke the pre-existing legal duty rule - a party who does only what he is already legally obligated to do has not suffered a legal detriment and thus the modification fails for want of consideration - they have waived their right to raise that issue by failing to articulate it and to support it with citations to relevant authority and the record. *See* Fed. R. App. P.

28(a)(7),(a)(9); *John v. Barron*, 897 F.2d 1387, 1393-94 (7th Cir. 1990); *see also First Wis. Nat'l Bank v. Oby, 188* N.W.2d 454 (Wis. 1971); *Allegheny College v. National Chautaqua Cty. Bk.*, 159 N.E. 173 (N.Y. 1927) (Cardoze, C.J.); John D. Calamari & Joseph M. Perilli, Contracts § 4-9-10 (2d ed. 1987).

Early in this matter appellees moved for sanctions, arguing that the Zahran's relentless pursuit of their claims was vexatious and undertaken in bad faith. *See* Fed. R. App. P. 38; *Brooks v. Allison Div. of General Motors*, 874 F.2d 489,490-91 (7th Cir. 1989). As we noted in *Zahran v. Frankenmuth Mut.* Ins. Co.., Nos. 97-1712 & 98-1905, 1998 WL 975072 (7th Cir. Sept. 17, 1998) (unpublished disposition), this circuit employs a two-part test to determine whether sanctions should be entered. First, the court must conclude that the appeal is frivolous, and second, that sanctions are appropriate. *See Depoister v. Mary M. Holloway Foundation*, 36 F.3d 582, 588 (7th Cir. 1994). An appeal is frivolous when "the result is foreordained by the lack of substance to the appellant's arguments." *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989)(en banc), or when the appeal "merely restates arguments that the district court properly rejected," *A-Abart Elec. Supply, Inc. v. Emerson Elec. Co.*, 956 F2d 1399, 1406-07 97th Cir. 1992) (internal quotation and citation omitted). The court requires some indication that the appeal was prosecuted for purposes of delay, harassment, or out of sheer obstinacy, with no reasonable exception of altering the district court's judgement. *See Flexible Mfg. Sys. Pty. Ltd v. Super Products Corp.*, 86 F.3d 96, 101 (7th Cir. 1996).

In *Zahran I* we expressed deep scepticism, based on the same facts that give no rise to this case, that the Zahrans could prevail on a cause of action predicated either on the innocent insured rule or by raising questions of Frankenmuth's alleged non-reliance on material misrepresentations. *See Zahran I*, 1994 WL 107909, at *5nn.2-3; *Tempelis v. Aetna Cas. &*

*Surety Co.*,473 N.W. 2d 549, 552-43 (Wis. 1991) (reliance), *aff'd and modified on other grounds*, 485 N.W. 2d 217 (Wis. 1992); *Hedtcke v. Sentry Ins. Co.*, 326 N.W. 2d 727, 737-40 (Wis. 1982) (innocent insured). Undeterred, the Zahrans proceeded to file a malpractice action based on these same tow theories of liability. The district court, however, found neither legal nor factual grounds to permit Karen Zahran to invoke the innocent insured rule, and likewise found no need for Frankenmuth to demonstrate reliance on the Zahrans' fraudulent proofs of loss. Not with standing these findings and our prior cautionary observations, the Zahrans have made no meaningful effort in this appeal to address or to distinguish *Tempelis* and *Hedtcke* from the circumstances of their own case; indeed, Tempelis goes unmentioned in the Zahrans' opening brief, and *Hedtcke* is noted in passing just once. Not only is such cursory or non-existence treatment insufficient to preserve their arguments for appellate review, *see John*, 897 F2d at 1393, the Zahrans' failure to address the dispositive legal issues in their case brings this matter within reach of our broad observation in *Newlin v. Helman* that plaintiffs who have been told that their claims are foreclosed and who then appeal without offering any argument to undermine the district court's conclusions are acting in bad faith. 123 F.3d 429, 433 (7th Cir. 1997).

Accordingly, Robin and Karen Zahran are directed under Rule 38 to show cause within 14 days why they should not be sanctioned for filing a frivolous appeal. In all other respects, the decisions of the district court underlying appeals No. 97-3710 and No. 98-2123 are **AFFIRMED.**

We further note that on April 5, 1999, appeal No. 99-1780 was docketed by the Zahrans in this court: they contest the post-judgement award of costs incurred by defendants for printing and photocopies, and for non-party witness and court reporters' deposition transcript fees. *See* 28 U.S.C. § 1920; Fed. R. Civ. P. 54(d)(1). Based on principles of judicial

economy we will **CONSOLIDATE** for disposition appeal No. 99-1780 with appeals No. 97-3710 and No. 98-2123.

The costs awarded to the defendants by the district court were for properly-covered, fully-documented items that were reasonable and necessary to the litigation. *See, e.g., Haroco, Inc. v. American Nat'l Bk & Trust Co.*, 38 F.3d 1429, (7th Cir. 1994); *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co.*, 924 F.2d 633, 642-44 (7th Cir. 1994). After reviewing the district judge's through and well-founded order, we have determined that the district court abused its discretion or misapplied relevant law; and that the costs awarded were neither excessive nor unreasonable. The court has therefore determined that the filing of briefs would not be helpful to its consideration of the issues. *See Mather v. Village of Mundelein*, 869, F.2d 356, 357 (7th Cir. 1989)(per curiam).

Accordingly, it is ordered that the post-judgement decision of the district court awarding costs and fees to the defendants is summarily **AFFIRMED.** See Taylor v. City of New Albany, 979 F.2d 87 (7th Cir. 1992), *cert. denied*, 506 U.S. 1085 (1993).

United States Court of Appeals
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Gina J. Angello
Clerk
312-435-5850

Re: 97-3710, 98-2123

Dear Sir or Madam,

I am returning these documents to you unfiled.

The mandate of this court issued on 5/6/99 which returned the case to the District Court and closed the appeal in this court.

The only filing we could accept in this appeal at this time would be a motion to recall the mandate.

This court no longer has jurisdiction over this case.

Sincerely,

Pro Se Clerk

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 17, 1999

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANE, Circuit Judge

| | |
|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, | )Appeals from the United )States District Court for )the Eastern District of |
| No. 97-3710, 98-2123 | )Wisconsin. |
| v. | ) |
| GERALD G. SCHMIDT, JR., individually, and the law firm of | ) No. 95 C 334 ) |
| SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees. | )Charles N. Clevert, ) Judge ) ) ) ) ) ) |

**ORDER**

Upon consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on April 18, 1999, by petitioners-appellants *pro se*, no judge in active service has requested a vote on the rehearing *en banc*, and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

**IT IS ORDERED** that the aforesaid petition for rehearing with suggestion for rehearing *en banc* be **DENIED.**

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 19, 1999
Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANE, Circuit Judge

| | |
|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, No. 97-3710, 98-2123 v. GERALD G. SCHMIDT, JR., individually, and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees. | )Appeals from the United )States District Court for )the Eastern District of )Wisconsin. ) ) No. 95 C 334 ) )Charles N. Clevert, ) Judge ) ) ) ) ) ) |

**ORDER**

For almost a decade, Robin and Karen Zahran have been embroiled in litigation, mostly self-initiated, stemming from storm and fire damage at their Wisconsin dairy farm in 1989 and 1990. The Zahrans, who are Illinois citizens, brought multiple federal lawsuits* under the diversity statute, 28 U.S.C. § 1332,

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* For a full account of the Zahrans' litigation, see *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-3710, 98-2123 & 99-

and in April 1999 we affirmed the judgements underlying these consolidated appeals and directed the Zahrans to show cause why they should not be sanctioned under Federal Rule of Appellate Procedure 38 for pursuing a frivolous appeal. *See Zahran v. Schmidt*, Nos. 97-3710, 98-2123 & 99-1780, 1999 WL 220112 (7th Cir. Apr. 14, 1999) *("Zahran VI")*. For the reasons that follow, and subject to certain limitations, see *Support Sys. Int'l v. Mack*, 45 F.3d 185 (7th Cir. 1995), we now bar Robin and Karen Zahran from further litigation in the federal courts of this circuit.

In 1990, the Zahrans first sued Frankenmuth Mutual Insurance Company after the insurer refused to pay the full amount of the Zahrans' casualty claims, and Frankenmuth countersued to recover the partial payments it already had made. following a trail and cross-appeals, we affirmed the

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1780, 1999 WL 220112 (7th Cir. Apr. 14, 1999); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-1712, 97-3710, 98-2123 & 98-1905 WL 975094(7th Cir. Nov. 4, 1998); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-1712 & 98-1905, 1998 WL 975072 (7th Cir. Sept. 17, 1998); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 95-2588 & 96-2270, 1997 WL 205381 (7th Cir. Apr. 22, 1997); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 93-2853, 1995 WL 241392 (7th Cir. Apr. 25, 1995); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 92-1778 & 92-1848, 1994 WL 107909 (7th Cir. Mar. 28, 1994). See also *Zahran v. Frankenmuth Mt. Ins. Co.*, No. 94 C 4827, 1997 WL 53107 (N.D. Ill. Feb. 6, 1997); *Zahran v. Frankenmuth Mut. Ins. Co.*, No.94 C 4827, 1996 WL 446891 (N.D. Ill. Aug. 2, 1996); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 94 C 4827, 1996 WL 182563 (N.D. Ill. Apr. 15, 1996); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 94 C 4827, 1995 WL 535088 (N.D. Ill. Sept. 5, 1995).

jury's verdict against the Zahrans on their claims, reversed the dismissal of Frankenmuth's counterclaim, and remanded with instructions to enter judgement in favor of the company on its counterclaim . *See Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 92-1778 & 92-1848, 1994 WL 107909 (7th Cir. Mar. 28, 1994) *("Zahran I")*. Robin and Karen Zahran then proceeded, over the course of the next five years, to bring additional suits against what appears to have been anyone connected with their original loss claims. In their complaints, the Zahrans alleged a plethora of harms, including breach of contract, breach of the duties of fair dealing and good faith, breach of fiduciary duty, bad faith, fraud, conspiracy to defraud, racketeering, slander, libel, interference with contractual relations, violations of the Fair Credit Reporting Act, 15 U. S. C. § 1681 *et seq.*, loss of credit rating, racism, assorted common law torts and malpractice. The district courts, and this court on review, determined these claims either to be unsupported by evidence or case law, flatly meritless, or barred on principles of preclusion, the *Rooker-Feldman* doctrine, or waiver. *See Zahran VI*, 1999 WL 220112 at *2-3; *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 97-1712, 1999 WL 191493 (7th Cir. Mar. 25, 1999) *("Zahran IV"); Zahran v. Frankenmuth Mut. Ins. Co.*, No. 97 C 978 (N.D. Ill. Mar. 11, 1998), *aff'd* No.98-1905, 1998 WL 975072 (7th Cir. Sept. 17, 1998) *("Zahran V")*.

The appeals giving rise to our present order are illustrative of the Zahrans' approach to litigation in this circuit. In *Zahran I*, we twice observed that arguments the Zahrans had forfeited by not raising them at trail appeared in any event to be unsupportable based on the facts of the case. 1994 WL 107909, at*2nn.2-3. Karen Zahran separately appealed the denial of a post-judgment motion in the case underlying *Zahran I, see* Fed. R. Civ. P. 60(b), but rather than identify perceived abuses of discretion or errors by the district court, she merely attempted to re-litigate the merits of the underlying lawsuit. We affirmed

the district court's decision. *See Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 95-2588 & 96-2270, 1997 WL 205381 (7th Cir. Apr. 22, 1997) *("Zahran III(a) & II(b)")*. Undeterred, Robin and Karen Zahran next sued their former attorneys for malpractice based on the same acts, omissions and theories of liability asserted in their first appeal. They lost at trial, in part because of the infirmities we previously identified. Still the Zahrans appealed, and when they did they failed entirely to address the dispositive legal issues in the matter - notwithstanding our prior observations in *Zahran I*- and once again simply attempted to re-litigate their case on appeal. *See Zahran VI*, 1999 WL 220112, at *4.

The decision to appeal, like the decision to initiate a lawsuit in district court, should be a considered one rather than a "knee-jerk reaction" to every adverse decision or event. *See Simon & Flynn, Inc.. v. Time Inc.*, 513 F.2d 832, 834 (2d Cir. 1975) (cited in *Maneikis v. Jordan*, 678 F.2d 720, 722 (7th Cir. 1985). Frivolous appeals divert scarce judicial resources from meritorious cases filed by litigants who are willing to abide by the court's rules and decisions, and part of our responsibility is to allocate our resources in a way that promotes justice and ensures that the courthouse doors remain open to all. *See In re McDonald*, 489 U.S. 180, 184 (1989); *United States ex rel. Verdone v. Circuit Court for Taylor County*, 73 F.3d 669, 671 (7th Cir. 1995). Time and again the Zahrans have been told their claims are frivolous, yet they proceeded undeterred, often after having been subjected to substantial sanctions in the district courts. In our initial order in *Zahran IV*, we observed that the Zahrans have refused to accept the adverse judgements handed them by the various courts of this circuit. *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 97-1712, 1998 WL 975072, at *7 (7th Cir. Sept. 17, 1998). Their consistent response has been simply to file another suit in a different district court, despite repeated determinations that their causes of action are

meritless or otherwise barred fro re-litigation. In this regard, we note that the Zahrans tendered insufficient funds checks totaling almost $12,000 to satisfy sanctions imposed by the district courts, and when told the checks are worthless they did nothing until we directed them to respond to a motion to hold them in contempt.

It is time for this endless litigation to stop. The Zahrans' vexatious filings already have prompted us to curtail to a degree their ability to initiate new lawsuits arising from these events of nearly a decade ago. *See Zahran IV, & V,* 1998 WL 975072, at*7-8. But enjoining their pursuit of new lawsuits has not dissuaded the Zahrans from continuing to advance frivolous arguments in the old ones. We thus conclude that a broader restriction on the Zahrans' power to enmesh the federal courts in their campaign of harassment is both necessary and appropriate. At present, the Zahrans only active case in this circuit court is appeal no. 99-1618, which arises from a post-judgment award of costs in cause No. 93 C 543, the action underlying *Zahran v. Cleary Bldg. Corp.*, Nos. 97-3813 & 98-2122, 1999 WL 439402 (7th Cir. June 21, 1999). That appeal will continue to its conclusion, but that will be all.

**IT IS ORDERED** that, with the exception of papers on briefs tendered in this court in connection with appeal no. 99-1618, the clerks of the federal courts in this circuit shall return unfiled any documents tendered by or on behalf of Robin or Karen Zahran, either individually, jointly, with others, or through a representative.* Should Robin or Karen Zahran continue to file new actions or otherwise act in violation of this order, the federal courts of this circuit, including this court,

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* An exceptions made for criminal cases and petitions for writ of habeas corpus. *See Support Sys. Int'l, Inc. v. Mack,* 45 F.3d 185, 186 (7th Cir. 1995).

reserve the right to initiate contempt proceedings against the. *See, e.g., Verdone,* 73 F.3d at 674-75; *Mack,* 45 F.3d at 186-87. The numerous injunctions entered by the district courts of this circuit remain in place, as will the injunction entered in our order of September 17, 1998, *see Zahran IV & V,* 1998 WL 97502, at *7-8, but their significance is limited in light of this order.

**IT IS FURTHER ORDERED** that the Zahrans are granted leave to petition this court, no earlier than two years from today's date, for modification or rescission of this order. The petition must either (a) be prepared and filed by a licensed attorney, or (b) if filed by the Zahrans *pro-se,* be accompanied by a supporting memorandum of law. Any petition shall include a detailed affidavit certifying that the claims sought to be presented are not frivolous and have never before been raised in a prior suit. The affidavit should also set forth facts showing that the pattern of vexatious litigation in which the Zahrans have engaged to date will reoccur if the petition is granted.

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 7, 1999
Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANE, Circuit Judge

| | |
|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, No. 97-3710, 98-2123 v. GERALD G. SCHMIDT, JR., individually, and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees. | )Appeals from the United )States District Court for )the Eastern District of )Wisconsin. ) ) No. 95 C 334 ) )Charles N. Clevert, ) Judge ) ) ) ) ) |

Upon consideration of the **MOTION FOR CLARIFICATION OF ORDER OF THIS COURT DATED 8/19/99 DIRECTING THAT EITHER OF ZAHRANS JOINTLY, INDIVIDUALLY, WITH OTHERS, OR THROUGH A REPRESENTATIVE BE BARRED FROM FILING ANY PAPERS IN THE FEDERAL COURTS OF THIS CIRCUIT,** filed on August 21, 1999 by pro-se appellant Robin Zahran.

**IT IS ORDERED** that this court's order of August 19, 1999 is **AMENDED** to read as follows:

For almost a decade, Robin and Karen Zahran have been embroiled in litigation, mostly self-iniated, stemming from storm and fire damage at their Wisconsin dairy farm in 1989 and 1990. The Zahrans, who are Illinois citizens, brought multiple federal lawsuits* under the diversity statute, 28 U.S.C. § 1332, and in April 1999 we affirmed the judgements underlying these consolidated appeals and directed the Zahrans to show cause why they should not be sanctioned under Federal Rule of Appellate Procedure 38 for pursuing a frivolous appeal. *See Zahran v. Schmidt,* Nos. 97-3710, 98-2123 & 99-1780, 1999

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*For a full account of the Zahrans' litigation, see *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-3710, 98-2123 & 99-1780, 1999 WL 220112 (7th Cir. Apr. 14, 1999); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-1712, 97-3710, 98-2123 & 98-1905 WL 975094(7th Cir. Nov. 4, 1998); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-1712 & 98-1905, 1998 WL 975072 (7th Cir. Sept. 17, 1998); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 95-2588 & 96-2270, 1997 WL 205381 (7th Cir. Apr. 22, 1997); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 93-2853, 1995 WL 241392 (7th Cir. Apr. 25, 1995); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 92-1778 & 92-1848, 1994 WL 107909 (7th Cir. Mar. 28, 1994). See also *Zahran v. Frankenmuth Mt. Ins. Co.*, No. 94 C 4827, 1997 WL 53107 (N.D. Ill. Feb. 6, 1997); *Zahran v. Frankenmuth Mut. Ins. Co.*, No.94 C 4827, 1996 WL 446891 (N.D. Ill. Aug. 2, 1996); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 94 C 4827, 1996 WL 182563 (N.D. Ill. Apr. 15, 1996); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 94 C 4827, 1995 WL 535088 (N.D. Ill. Sept. 5, 1995).

WL 220112 (7th Cir. Apr. 14, 1999) *("Zahran VI")*. For the reasons that follow, and subject to certain limitations, *see Support Sys. Int'l v. Mack*, 45 F.3d 185 (7th Cir. 1995), we now bar Robin and Karen Zahran from further litigation in the federal courts of this circuit.

In 1990, the Zahrans first sued Frankenmuth Mutual Insurance Company after the insurer refused to pay the full amount of the Zahrans' casualty claims, and Frankenmuth countersued to recover the partial payments it already had made. following a trail and cross-appeals, we affirmed the jury's verdict against the Zahrans on their claims, reversed the dismissal of Frankenmuth's counterclaim, and remanded with instructions to enter judgement in favor of the company on its counterclaim . *See Zahran v. Frankenmuth Mut. Ins. Co.,* Nos. 92-1778 & 92-1848, 1994 WL 107909 (7th Cir. Mar. 28, 1994) *("Zahran I")*. Robin and Karen Zahran then proceeded, over the course of the next five years, to bring additional suits against what appears to have been anyone connected with their original loss claims. In their complaints, the Zahrans alleged a plethora of harms, including breach of contract, breach of the duties of fair dealing and good faith, breach of fiduciary duty, bad faith, fraud, conspiracy to defraud, racketeering, slander, libel, interference with contractual relations, violations of the Fair Credit Reporting Act, 15 U. S. C. § 1681 *et seq*., loss of credit rating, racism, assorted common law torts and malpractice. The district courts, and this court on review, determined these claims either to be unsupported by evidence or case law, flatly meritless, or barred on principles of preclusion, the *Rooker-Feldman* doctrine, or waiver. *See Zahran VI*, 1999 WL 220112 at *2-3; *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 97-1712, 1999 WL 191493 (7th Cir. Mar. 25, 1999) *("Zahran IV"); Zahran v. Frankenmuth Mut. Ins. Co.,* No. 97 C 978 (N.D. Ill. Mar. 11, 1998), *aff'd* No.98-1905, 1998 WL 975072 (7th Cir. Sept. 17, 1998) *("Zahran V")*.

The appeals giving rise to our present order are illustrative of the Zahrans' approach to litigation in this circuit. In *Zahran I,* we twice observed that arguments the Zahrans had forfeited by not raising them at trail appeared in any event to be unsupportable based on the facts of the case. 1994 WL 107909, at*2nn.2-3. Karen Zahran separately appealed the denial of a post-judgment motion in the case underlying *Zahran I, see* Fed. R. Civ. P. 60(b), but rather than identify perceived abuses of discretion or errors by the district court, she merely attempted to re-litigate the merits of the underlying lawsuit. We affirmed the district court's decision. *See Zahran v. Frankenmuth Mut. Ins. Co.,* Nos. 95-2588 & 96-2270, 1997 WL 205381 (7th Cir. Apr. 22, 1997) *("Zahran III(a) & II(b)").* Undeterred, Robin and Karen Zahran next sued their former attorneys for malpractice based on the same acts, omissions and theories of liability asserted in their first appeal. They lost at trial, in part because of the infirmities we previously identified. Still the Zahrans appealed, and when they did they failed entirely to address the dispositive legal issues in the matter - notwithstanding our prior observations in *Zahran I*- and once again simply attempted to re-litigate their case on appeal. *See Zahran VI,* 1999 WL 220112, at *4.

The decision to appeal, like the decision to initiate a lawsuit in district court, should be a considered one rather than a "knee-jerk reaction" to every adverse decision or event. *See Simon & Flynn, Inc.. v. Time Inc.,* 513 F.2d 832, 834 (2d Cir. 1975) (cited in *Maneikis v. Jordan,* 678 F.2d 720, 722 (7th Cir. 1985). Frivolous appeals divert scarce judicial resources from meritorious cases filed by litigants who are willing to abide by the court's rules and decisions, and part of our responsibility is to allocate our resources in a way that promotes justice and ensures that the courthouse doors remain open to all. *See In re McDonald,* 489 U.S. 180, 184 (1989); *United States ex rel. Verdone v. Circuit Court for Taylor County,* 73 F.3d 669, 671

(7th Cir. 1995). Time and again the Zahrans have been told their claims are frivolous, yet they proceeded undeterred, often after having been subjected to substantial sanctions in the district courts. In our initial order in *Zahran IV*, we observed that the Zahrans have refused to accept the adverse judgements handed them by the various courts of this circuit. *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 97-1712, 1998 WL 975072, at *7 (7th Cir. Sept. 17, 1998). Their consistent response has been simply to file another suit in a different district court, despite repeated determinations that their causes of action are meritless or otherwise barred fro re-litigation. In this regard, we note that the Zahrans tendered insufficient funds checks totaling almost $12,000 to satisfy sanctions imposed by the district courts, and when told the checks are worthless they did nothing until we directed them to respond to a motion to hold them in contempt.

It is time for this endless litigation to stop. The Zahrans' vexatious filings already have prompted us to curtail to a degree their ability to initiate new lawsuits arising from these events of nearly a decade ago. *See Zahran IV, & V*, 1998 WL 975072, at*7-8. But enjoining their pursuit of new lawsuits has not dissuaded the Zahrans from continuing to advance frivolous arguments in the old ones. We thus conclude that a broader restriction on the Zahrans' power to enmesh the federal courts in their campaign of harassment is both necessary and appropriate. At present, the Zahrans have two active cases in this circuit. The first, appeal no. 99-1618 pending in this court, arises from a post-judgment award of costs in cause No. 93 C 543, the action underlying *Zahran v. Cleary Bldg. Corp.*, Nos. 97-3813 & 98-2122, 1999 WL 439402 (7th Cir. June 21, 1999). The second, *Zahran, et al v. National Guardian Life Ins. Co.*, No. 90-CV-907 (N.D. Ill. filed Feb. 16, 1990), resulted in the August 20, 1999 entry of a monetary judgement against Robin Zahran and his wholly-owned corporation, Oak

Brook Associates Financial Services, Inc. We will permit Robin and Karen Zahran to litigate appeal no. 99-1618 to its conclusion. We will also allow Robin Zahran and his corporation to litigate the *National Guardian* case to its conclusion, including through appeal should there be one. And that will be all.

**IT IS ORDERED** that, except as stated above with respect to appeal no. 99-1618 in this court and Cause No. 90-CV-907 in the United States District Court for the Northern District of Illinois, the clerks of the federal courts in this circuit shall return unfiled any documents tendered by or on behalf of Robin or Karen Zahran, either individually, jointly, with others, or through a representative.* Should Robin or Karen Zahran continue to file new actions or otherwise act in violation of this order, the federal courts of this circuit, including this court, reserve the right to initiate contempt proceedings against the. *See, e.g., Verdone*, 73 F.3d at 674-75; *Mack*, 45 F.3d at 186-87. The numerous injunctions entered by the district courts of this circuit remain in place, as will the injunction entered in our order of September 17, 1998, *see Zahran IV & V*, 1998 WL 97502, at *7-8, but their significance is limited in light of this order.

**IT IS FURTHER ORDERED** that the Zahrans are granted leave to petition this court, no earlier than two years from today's date, for modification or rescission of this order. The petition must either (a) be prepared and filed by a licensed attorney, or (b) if filed by the Zahrans *pro-se*, be accompanied by a supporting memorandum of law. Any petition shall include

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* An exceptions made for criminal cases and petitions for writ of habeas corpus. *See Support Sys. Int'l, Inc. v. Mack*, 45 F.3d 185, 186 (7th Cir. 1995).

a detailed affidavit certifying that the claims sought to be presented are not frivolous and have never before been raised in a prior suit. The affidavit should also set forth facts showing that the pattern of vexatious litigation in which the Zahrans have engaged to date will reoccur if the petition is granted.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF WISCONSIN**

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| | |
|---|---|
| ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs | )<br>)CASE NO.<br>) 95 C 334 |
| v | ) |
| GERALD G. SCHMIDT, JR., Individually, and the law firm of SCHMIDT, DARLING ERWIN, and COREGIS INSURANCE CO., and | ) |
| ROBERT C. BURRELL, Individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, and RELIANCE INSURANCE COMPANY, and | ) |
| MARJAN R. KMEIC, Individually, and the Law Firm of KMEIC LAW OFFICE and WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY, Defendants | ) |

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HONORABLE CHARLES N. CLEVERT

PRESIDING DISTRICT COURT JUDGE

MILWAUKEE, WISCONSIN SEPTEMBER 23, 1997
COURT'S DECISION

HELD IN THE ABOVE ENTITLED COURT TRIAL

APPEARANCES:

JOHN H. BICKLEY, JR., John H. Bickley & Associates, 230 N. Michigan Ave., Chicago, IL 60601 appearing for Karen Zahran

KENNETH R. NOWAKOWSKI, Whyte, Hirschboeck & Dudek, 111 E. Wisconsin Ave., Milwaukee, WI 53202, appearing for Gerald Schmidt, Schmidt, Darling & Irwin and Coregis Insurance Company.

TERRY E. JOHNSON, Peterson, Johnson & Murray, 733 N. Van Buren St., Milwaukee, WI 53202, appearing for Robert Burrell and Borgelt, Powell, Peterson & Frauen and Reliance Insurance Company,

CRAIG NELSON and CHRISTINE K. NELSON, Nelson, Dries & Zimmerman, 150 N. Sunnyslope Rd., Brookfield, WI 53005, appearing for Marjan Kmiec and Kmiec Law Office and Wisconsin Lawyers Mutual Insurance Company.

CYNTHIA M. BOHMAN
Official United States Court Reporter
517 E. Wisconsin Avenue, Room 226
Milwaukee, WI 53202

PROCEEDINGS

(Afternoon proceedings commenced at 2:01 p.m.)

THE CLERK: Case number 95 C 334, Robin Zahran and Karen Zahran, plaintiffs, v. Gerald G. Schmidt, et al. May we have the appearances, please.

MR. BICKLEY: If the court please, John H. Bickley, Jr. representing Mrs. Zahran. Mr. Zahran is unable to be present this morning as I believe he's communicated to the Court. He's suffering from a brain aneurysm and he's in the

hospital right now having an, I think it's an angiogram to determine whether it's operable or not. Excuse his presence.

MS. NELSON: Christine K. Nelson and Craig Nelson, law firm of Nelson, Dries & Zimmerman, S.C. on behalf of Marjan R. Kmiec, Kmiec Law Offices and Wisconsin Layers. Mutual Insurance Company. Mr. Kmiec is also in court.

MR. JOHNSON: For the defendants Robert Burrell, Borgelt, Powell, Peterson & Frauen and Reliance Insurance Company, Terry Johnson.

MR. NOWAKOWSKI: For the Schmidt defendants, Kenneth R. Nowakowski, Whyte, Hirschboeck, Dudek.

THE COURT: Good afternoon, everyone. I do want to issue a decision in connection with this matter today. It was a rather protracted trail in this case and it was quite unfortunate that we were not able to resolve this matter immediately upon the close of testimony. However, the Court did delay in large measure because, as you know, Mr. Zahran became ill immediately after he concluded his testimony in this case. As you know, this case is one which is in large measure about credibility. It is one where the plaintiffs, Karen Zahran and Robin Zahran, are alleging legal malpractice by the individual defendants and are seeking to recover from them and their insurance carriers.

In order to establish legal malpractice a plaintiff must show that there is an attorney-client relationship, acts of negligence by the attorney, injury to the client. There must be proximate cause for the injury resulting from the attorney's negligence, i.e., the client would have been successful in the matter for which the attorney was engaged but for the negligence. Also, the client's loss is restricted generally to the amount that was recovered except for the attorney's negligence. In order to establish its claim a plaintiff must produce testimony of an expert and present testimony that the alleged negligence

made a difference in the outcome of the matter handled by the defendant attorneys.

Let me go to the end and then go back and recap. The Court finds for the defense with regard to all matters in this case and against the plaintiffs. The Court has concluded that the plaintiffs in this case cannot and did not sustain their burden of proof and that there was a failure to proof with respect to their claim. The court also finds that with respect to Mr. Kmiec the defendants are liable to Mr. Kmiec for costs which were incurred on their behalf and with regard to their agreement to pay him $20,000 pursuant to a modified contract with Mr. Kmiec.

Now, to go back and touch on some points that are very significant and from a basis for the Court's conclusion. As I said, this is a case which is essentially about credibility. At all times relevant Robin Zahran and Karen Zahran were married and owned a dairy farm in Denmark, Wisconsin. The Zahrans are Illinois residents and reside at 718 Acorn Hill Road, Oakbrook, Illinois.

Marjan Kmiec is a licensed Wisconsin attorney whose office is located at 3741 West National Avenue, Milwaukee. Wisconsin Lawyers Mutual Liability Insurance Company is the professional liability carrier providing coverage pursuant to the terms, conditions, limits of liability and exclusions of said policy for Kmiec for the claim which forms the subject matter of this litigation. Robert C. Burrell is a licensed Wisconsin attorney and a shareholder in the law firm o Borgelt, Powell, Peterson & Frauen, S.C. This firm is insured by Reliance Insurance Company for professional liability for the claim asserted in this case. Gerald G. Schmidt, Jr. is a Wisconsin attorney, a licensed Wisconsin attorney. He practices law with Schmidt, Darling & Irwin. Coregis Insurance Company is the professional liability carrier for his firm.

On or about July 19, 1988 Frankenmuth Mutual Insurance Company issued a farm policy number FR0423155 to Robin and Karen Zahran providing insurance coverage for among other things their dairy farm located at 18422 Rosecrans Road, Denmark, Wisconsin. On May 24, 1989 a tornado struck the Zahrans' farm causing damage to various farm buildings, structures and personal property. Robin and Karen Zahran submitted to Frankenmuth two sworn proofs of loss and a letter as follows; (A) proof of loss dated July 25th, 1989 making claim in the amount of $240,300.37 less their deductible, (B) a proof of loss dated September 8, 1989 making claim in the amount of $180,564.67, and a letter dated September 22nd, 1989 claiming tornado damages in the amount of $314,492. The two sworn proofs of loss were signed by Robin and Karen Zahran. The third document was signed by Robert Burrell but was submitted on behalf of Robin and Karen Zahran.

Between approximately July 1 of 1989 and December 1 of 1989 Frankenmuth Insurance Company paid Robin and Karen Zahran a total of $182,888.37 on their tornado loss claim. Robin and Karen Zahran were not satisfied with that payment. In January of 1990 Robin and Karen Zahran employed the Illinois law firm of Fitzsimmons, Roberts, Bowen & Paine to commence an action against Frankenmuth Insurance and the United States District Court for the Northern District of Illinois alleging bad faith, breach of contract and violations of various statutes as a result of Frankenmuth's adjustment of their tornado claim. this suit was transferred to the United States District Court for the Eastern District of Wisconsin.

On July 23rd of 1990 Frankenmuth answered the complaint and asserted affirmative defenses and a counterclaim alleging that Robin and Karen Zahran misrepresented or concealed material facts in their proofs of loss. Frankenmuth's counterclaim sought repayment of the $182,888.37 previously paid on the tornado claim due to the alleged misrepresentation

and their proofs of loss. Attorney Melville Bowen, Jr. of the Fitzsimmons, Roberts, Bowen & Paine firm answered the Frankenmuth counterclaim in May of 1990 on behalf of both Robin and Karen Zahran.

In March of 1990 and on July 8th of that year while the Zahran's farm property remained insured with Frankenmuth two fires damaged the property once again. I should say the property was damaged once again by and in this case by two fires. The July 8, 1990 fire caused considerable damage including destruction of barn 151. By a proof of loss dated on or about August 28th of 1990 Robin Zahran and Karen Zahran asserted a claim against Frankenmuth for the July 8 fire for an approximate sum of $116,800. On or about November 1 of that year Frankenmuth made payment to Robin Zahran and Karen Zahran for the July 8 fire loss in the amount of $99,995. Of that sum the policy limits of $75,000 were paid for the fire loss to barn 151.

The Zahrans commenced separate litigation against Frankenmuth for the damages sustained in the fire loss on or about March 18 of 1991. The claim was made for both compensatory damages as well as consequential and punitive damages for alleged breach of good faith. The fire litigation was commenced on behalf of the plaintiffs by Attorney Joan Slezak, S-l-e-z-a-k. This case was ultimately transferred to the United States District Court for the Eastern District of Wisconsin. Thereafter an amended complaint was filed on behalf of the plaintiffs by Slezak. In March of 1992 Slezak withdrew her representation of Robin and Karen Zahran and they pursued the fire litigation pro se ultimately participating in trials.

On July 11, 1990 Robin and Karen Zahran retained Attorney Gerald Schmidt of Schmidt, Darling & Irwin to represent their interests in connection with the still pending lawsuit against Frankenmuth arising out of the tornado loss.

Judge Thomas J. Curran ordered Schmidt, Darling & Irwin and Gerald G. Schmidt substituted as counsel for the plaintiffs in place of Fitzsimmons, Roberts, Bowen & Paine. That he did on about July 23rd. Schmidt subsequently recommended that Robin and Karen retain Attorney Robert Burrell of Borgelt, Powell, Peterson & Frauen to represent their interests in that case. On or about October 11th of 1990 a formal substitution of attorneys was executed substituting the firm of Borgelt, Powell, Peterson & Frauen, S.C. in place of Schmidt, Darling & Irwin. Substitution was formally ordered on October 22nd,, 1990.

The scope of the Zahrans' retainer with Attorney Burrell was defined by a retainer contract dated September 1990 which included the prosecution of settlement of all claims for damages against Frankenmuth Insurance Company or others who shall be liable on account of the tornado wind damage of May 25th 1989 and the fire of July 8, 1990. On November 22nd , 1990 Burrell received Frankenmuth's drafts totalling the $99,995 previously mentioned with respect to the July 8, 1990 fire loss. Consistent with the retained agreement Borgelt, Powell, Peterson & Frauen received 50 percent of $20,000 of Frankenmuth's fire loss payment as attorneys fees.

On January 6, 1990 Frankenmuth filed a motion for leave to file its first amended answer including affirmative defenses and a counterclaim in the tornado litigation. Frankenmuth's proposed amended answer, affirmative defenses and counterclaim was identical to the original answer, affirmative defenses and counterclaim filed April 1990 with the exception of an additional affirmative defense alleging that Frankenmuth was entitled to an offset in the tornado litigation for payments made for the July 8 fire damage to barn 151 on the dairy farm. Mr. Burrell did not oppose this motion. The Court granted Frankenmuth's motion to amend in January of 1991.

The Court further notes that there was no basis for Attorney Burrell to oppose the motion to amend.

Burrell filed a reply to the counterclaim on or about February 1, 1991. In early 1991 Burrell advised Robin Zahran that Frankenmuth had offered $25,000 to settle the pending tornado litigation including but not limited to Robin and Karen Zahran's bad faith claims. He also recommended that Robin and Karen Zahran accept Frankenmuth's settlement offer. Robin and Karen Zahran refused Frankenmuth's $25,000 offer. During his representation of Robin and Karen Zahran Attorney Burrell prepared them for their examinations under oath, attended those examinations, reviewed documents, conducted discovery, negotiated with Frankenmuth's counsel and otherwise engaged in reasonable efforts to resolve the Zahran's tornado and fire claims.

Because he did not want to pursue the Zahrans' bad faith claim in early 1991 Attorney Burrell recommended that Robin and Karen Zahran retain Attorney Marjan Kmiec of the Kmiec Law Offices. Thereafter Robin and Karen Zahran met with Attorney Kmiec and eventually agreed to retain him. A retained agreement dated march 18, 1991 was subsequently entered and by virtue of that the Kmiec Law Offices and Attorney Marjan Kmiec in particular assumed responsibility for representing Robin and Karen Zahran. However, the formal order allowing Borgelt, Powell to withdraw and for Mr. Kmiec to appear in the litigation was not signed by Judge Curran until April 25th, 1991.

The retainer agreement between Robin and Karen Zahran and Attorney Kmiec provided for a contingency fee in addition to the requirement that the plaintiffs reimburse counsel for any costs incurred plus a $3,000 nonrefundable sum or retainer. The Kmiec Law Offices scope of retainer was limited to the trial of the tornado case. Trial began in the tornado case on or about December 16, 1991.

At or near the beginning of the trial the Zahrans jointly received an offer of $110,000 from Frankenmuth together with a request that, I should say, rather together with an agreement that Frankenmuth's counterclaim would be withdrawn. Attorney Kmiec and Attorney Christopher McConville made good faith recommendations to Robin and Karen Zahran that they accept the settlement offer. They pointed out that Mr. Zahran made a poor witness and that they believed Judge Curran felt Mr. Zahran did not make a good presentation. They also indicated that the bad faith case was not particularly strong, that the Zahrans would be relieved of the potential judgment based upon the counterclaim, that there was difficulty in proving the damages claimed by the plaintiffs. Robin and Karen Zahran declined the settlement offer.

Mr. Zahran then modified the plaintiffs' contingency fee agreement by signing a note indicating that he and Karen would pay $20,000 minimum to Attorney Kmiec win or lose provided he did not continue to purse settlement or would not bring up settlement again. There were no other conditions placed on the fee agreement. Mr. Kmiec abided by that agreement.

During the course of - - I should say at the conclusion of the trial instructions were submitted to the Court. The elements of misrepresentation in a proof of loss were among those instructions. The jury instructions did not include reference to reliance as an element of misrepresentation. The trial concluded December 23rd, 1991 with a verdict rendered on December 26th. The verdict concluded that the Zahrans had misrepresented their loss under the terms of their policy. Motions after verdict were filed on behalf of the plaintiffs seeking a new trial or judgment notwithstanding the verdict and on behalf of the defendant seeking judgment on the counterclaim.

Throughout the handling of that matter involving Frankenmuth Attorney Kmiec incurred costs and expenses.

Throughout the representation of Mr. and Mrs. Zahran by Attorney Kmiec requests were made to the plaintiffs to reimburse costs and expenses. Mr. Kmiec was eventually allowed to withdraw as counsel of record for the plaintiffs on March 26 of 1992. As of the date of withdrawal to the present date the plaintiffs have failed to make payment to Attorney Kmiec of outstanding costs in the amount of $3,699.92 despite the plaintiffs' agreement to make payment to Attorney Kmiec in the minimum sum of $20,000. No payment has been made.

At or about the time of Mr. Kmiec's withdrawal he outlined the potential hazards of an appeal and gave the Zahrans his advise with respect to settlement. Nevertheless, the Zahrans appealed the trial court's determination pro se. The Seventh Circuit ruled on March 28, 1994 that the jury's decision was valid with regard to the plaintiffs' claim, that is, it was appropriate to dismiss the complaint brought by the Zahrans, wherein it reinstated the counterclaim in that case and directed that judgment be entered against the Zahrans and in favor of Frankenmuth. As a consequence the Zahrans were required to pay $182,888.37. An amended judgment in favor of Frankenmuth on the counterclaim was entered June 29 of 1994.

Between July 23rd, 1990 and October 22nd 1990 Attorney Schmidt made no court appearances in the tornado litigation. He filed no substantive pleadings, made no motions and took no depositions or other discovery. Between July 23rd, 1990 and October 22nd, 1990 there were no deadlines of any sort imposed in the tornado case which expired and there were no substantive pleadings due during that period. On October 12, 1990 Robin and Karen Zahran were represented by Attorney Burrell in an examination under oath by Frankenmuth Insurance.

Attorney Thomas Gooch testified on behalf of the Zahrans with respect to Attorney Schmidt's actions. However, he did not opine that Schmidt failed to adequately investigate

these matters. There is nothing in this record to support any additional response to Frankenmuth or any additional defenses or answers to Frankenmuth's defenses or counterclaims with respect to matters undertaken by Attorney Schmidt.

Let me turn for a moment to Attorney Gooch's testimony and then go back to matters relating more specifically to the defendants. As I said in the beginning, this case does hinge on credibility. Attorney Thomas Gooch gave opinion testimony in this case. His opinion testimony was the linchpin for the plaintiffs' case. However, the Court does not find Attorney Gooch's testimony worthy of belief.

Attorney Gooch testified, one, that Schmidt breached the standard of care owed to Robin and Karen Zahran because there was in irreconcilable conflict of interest. He testified that no attorney could have represented Karen and Robin Zahran. He testified that Frankenmuth paid the Zahrans before they filed a claim and had conducted its own investigation and that should have given rise to certain defenses. He testified that the defendants should have asserted the innocent insured doctrine, that is, they should have asserted that Karen Zahran was not involved in the alleged misdeeds of Robin Zahran.

The Court notes that this is the first time that Attorney Gooch has testified as an expert witness. However, he clearly failed to apply Wisconsin law regarding insurance claims, pleading standards and the duty of care owed by a Wisconsin attorney to his clients. This is especially true with regard to his contention that the defendants had an irreconcilable conflict of interest when they represented Robin Zahran and Karen Zahran. He also failed to acknowledge that Karen Zahran agreed with all of Robin Zahran's actions in that any recovery by Karen Zahran would benefit Robin Zahran.

He also failed to, he also failed to acknowledge that, I should say he also erroneously asserted that it was a breach of duty not to file motions for summary judgment in this case.

And by asserting that it was a breach of the standard of care for attorneys to ignore the reliance issue because Frankenmuth paid plaintiffs before a proof of loss was filed and conducted its own investigation.

With regard to Mr. Burrell, Mr. Gooch testified that Mr. Burrell failed to recognize he couldn't represent both plaintiffs. He told the plaintiff insurance company that Karen Zahran was innocent but never pled it. He asserted that there was no discovery regarding misrepresentation or reliance. He alleged that Mr. Burrell failed to obtain a second attorney for the plaintiffs. He asserted that Karen Zahran had an absolute defense to Frankenmuth's affirmative defense because Schmidt filed a proof of loss after it was signed in blank. And he also asserted that Mr. Burrell failed to plead lack of reliance as an affirmative defense because it paid the plaintiffs before they failed their claim.

Mr. Gooch further asserted that Mr. Kmiec breached the standard of skill required of Wisconsin attorneys again because of a conflict, same conflict previously cited by his failure to file motions regarding other losses, by its failure to amend pleadings, by its failure to preserve the innocent spouse issue for appeal, by his failure to preserve the estoppel issue for appeal, by not submitting jury instructions on the theory of reliance or estoppel, by not seeking dismissal of Frankenmuth's counterclaim and by not filing a motion in limine which should have been directed to the fire loss claim.

I must note further that in determining that Mr. Gooch was not a credible witness the Court also paid special attention to his testimony regarding motions in limine. Mr. Gooch apparently fails to recognize that motions in limine are not necessarily required in any case and he failed to show that there was any, that it was likely that Judge Curran would have ruled in the plaintiffs' favor with respect to the motions in limini. Mr. Gooch was essentially a friend of Attorney Bickley who did not

have the experience in Wisconsin that would have allowed him to testify concerning the standard of care. In fact, Mr. Gooch is not licensed to practice in the State of Wisconsin and indicated that on those occasions when he has represented someone in Wisconsin he has hired local counsel.

So all in all the Court does not believe the plaintiffs presented credible expert testimony with respect to the matters put into issue here and as a consequence were not in a position to sustain their burden of proof by presenting valid, credible expert testimony.

To continue. There are no credible expert facts before this Court to support any additional claims that Robin and Karen Zahran may have had against Frankenmuth in the underlying tornado case. The only proof of loss which Attorney Schmidt submitted to Frankenmuth was on August 28, 1990 in the proof of claim relating to the fire loss. There is no support in the record for the contention of Robin and Karen Zahran that this proof of loss was used in both the tornado case and the fire case to establish fraud on behalf of Mr. or Mrs. Zahran. Robin Zahran has admitted that the damage caused by the fire exceeded the damage claimed in the August 28, 1990 proof of loss. Robin Zahran contends that the proof of loss failed to indicate that he and Mrs. Zahran did not want to be paid twice for the same loss, once for the fire and once for the tornado, and that the proof of loss was used by Frankenmuth to create that inference in support of its counterclaim for fraud.

Frankenmuth's misrepresentation slash fraud counterclaim did not relate to the August 28, 1990 proof of loss but, rather, to the two sworn proofs of loss submitted by Robin and Karen Zahran themselves. The August 28, 1990 proof of loss was mentioned only in Frankenmuth's affirmative defenses for the proposition that Frankenmuth paid its policy limits of $75,000 with regard to barn 151 after the fire and therefore was entitled to an offset of that amount in the tornado case. During

the trial before Judge Curran the $75,000 payment was admitted when Mr. Zahran refused to answer questions regarding what he had been paid for barn 151.

The Court finds that Attorney Schmidt did not negligently fail to raise any affirmative defense related tot he innocent insured defense. Let me add here that plaintiff Karen Zahran has withdrawn her innocent insured claim in this matter but notwithstanding that I do want to note that the proof would have sustained such a claim regardless of whether - - let me just leave it there. The proof would not have sustained that claim.

Attorney Schmidt did not fail to adequately investigate Frankenmuth's allegations, defenses and counterclaims. Attorney Schmidt did not negligently fail to amend pleadings in the tornado action nor fail to pursue claims that Robin and Karen Zahran may have had against Frankenmuth. Attorney Schmidt was not negligent with regard to the August 28, 1990 proof of loss although the Court does note that it was improper to have Robin and Karen Zahran sign the documents in blank. Attorney Schmidt's actions with respect to the August 28, 1990 proof of loss did not, and I underscore that, did not cause Robin and Karen Zahran any damages.

With regard to Attorney Burrell and also with regard to the other defendants, I want to add that Mr. Gooch is assessing the conduct of the defendants in this case said he was applying a standard of care based upon what lawyer admitted to practice in the Seventh Circuit would have done. He did not specifically state that he was applying a standard based upon what attorneys in Wisconsin would have done. On the other hand, he added that he believed Seventh Circuit standards are the same as those in Wisconsin without making any specific reference to the basis for the opinion. The Court notes that there was no expert testimony - - strike that.

The Court finds that Attorney Burrell did not possess any facts suggesting that the proof of loss jointly filed by Robin

and Karen Zahran were misrepresentations filed with an interest to deceive Frankenmuth. Attorney Burrell possessed no facts suggesting that the proof of loss jointly filed by Karen and Robin Zahran were misrepresentations filed with an intent - - strike the last statement. Attorney Burrell did not possess any facts suggesting that Karen Zahran did not participate in the submission of the proofs of loss that were given to Frankenmuth and, in fact, reasonably concluded from Mrs. Zahran's signature on the proofs of loss that she participated in their preparation.

Attorney Burrell possessed no facts suggesting that Karen Zahran believed that any proofs of loss were inaccurate, misleading or fraudulent. Karen Zahran never

innocent insured defense would have insured to the benefit of Robin Zahran. Also, there was no basis for seeking summary judgment on the plaintiffs' claim against Frankenmuth.

With respect to Attorney Kmiec, it's noted that at the time Kmiec assumed responsibility for the representation of the plaintiffs in May of 1991 the trial date was imminent and motions to compel outstanding discovery had been filed. The discovery motions were resolved and the trial date was adjourned. As a result of the representation of Attorney Kmiec plaintiffs were able to retain, prepare and present witnesses at trial on the issue of bad faith, consequential damages in the form of lost milk profits, engineering testimony regarding damages to the structures on the property, et cetera. These witnesses were allowed even though the initial dates for designation of expert witnesses had passed prior to Kmiec's representation.

During the court of Kmiec's representation he and members of his office conducted and participated in numerous depositions of relevant parties and witnesses. Kmiec also conducted a thorough investigation of the facts themselves and visited the plaintiffs' farm in order to ascertain the location of various structures and to provide himself with a mental picture

would assist in his representation at trial. Throughout the course of Attorney Kmiec's representation he and members of his office kept both Mr. and Mrs. Zahran apprised of pre-trial developments and issues.

Throughout the course of Kmiec's representation Mr. and Mrs. Zahran were united in interest. Throughout the course of Kmiec's representation Mrs. Zahran never indicated that her claim was different from that of her husband's. And throughout the course of Kmiec's representation Mrs. Zahran participated in preparation for trial. The Court is of the view that Attorney Kmiec, therefore, exercised, I should say thereby exercised the degree of skill, care and judgment normally exercised by lawyers in Wisconsin. Based upon the court's review of the record below and the matters represented in this trial the Court further finds that plaintiffs have failed to demonstrate that the result of the tornado trial would have been different had the matter been handled as the plaintiffs suggest. Judgment in favor of Frankenmuth was the result of the plaintiffs' own negligence or intentional disregard of their counsel's advise and also because of a lack of proof to support their claims in the case before Judge Curran. There is nothing to indicate that the results would have been different if what the Zahrans now assert had been done in the trail below.

The Court finds that there have been no damages established in this case with regard to the matters that the plaintiffs are now claiming, that is, the plaintiffs have not proven that they have sustained losses as a result of any actions taken by the defendants. On the other hand, as the Court has also already indicated Mr. Kmiec has sustained damages and is entitled to judgment with regard to the contract that he entered with the Zahrans during the course of the trial below as well as his retainer agreement which calls for payment of his costs in connection with his representation.

The Court notes that in this case there are essentially five claims asserted by the plaintiffs. One was for breach of contract, one was for negligence, one was for consumer fraud, one was for common law fraud, one was for violation of fiduciary duty tot the plaintiff and with respect to Robin Zahran only there was a count for conspiracy and fraud by Mr. Kmiec. The claims have in each instance failed to meet their requisite burden of proof and their complaint against the defendants will, therefore, be dismissed.

Unless there are questions at this time the Court will on the basis of what has been set forth on the record enter judgment in favor of the defendants and against the plaintiffs in this case. As far as this case has gone, I do note that there was an additional claim by Mr. Kmiec which we did not pursue during this course of trial, during this trial. So I'd like to find out from Mr. Kmiec's counsel how he wishes to proceed in that regard.

MS. NELSON: Your Honor, I think that there are potentially two options at this point. The claim for malicious prosecution was not ripe until the Court's findings of today and the entry of judgment in favor of the defendants. I believe that claim is now ripe. the two alternatives that I see would be a determination by this Court that the judgment entered today would be final under Rule 54(b) for the purposes of appeal should anyone choose to take it ,or the other alternative is to enter into scheduling with regard to the further prosecution of the malicious prosecution claim.

During the course of trial the court had directed a question to me concerning additional proof. I'm not sure that I ever directly answered the question. In giving this matter some thought it occurs to me that the bulk of the evidence in support of the malicious prosecution claim has, in fact, been entered. I would anticipate that additional testimony, nor more than a day as for as Mr. Kmiec is concerned.

THE COURT: Well, the Court will enter judgment on the matters which have already been tried and the clocks will start to tick with respect to them. As far as the malicious persecution claim is concerned, the Court will give you a date and time to present. So I'll get my clerk for that purpose. Are there any other comments by counsel for the defence?

MR. JOHNSON: Your Honor, just one question. I presume that since that issue doesn't involve my client that we need not plan on participating in that.

THE COURT: I would hope not.

MR. JOHSNON: Thank you.

THE COURT: Mr. Nowakowski

MR. NOWAKOWSKI: I have nothing other than to echo what Mr. Johnson just said.

THE COURT: Mr. Bickley.

MR. BICKLEY: No comment, Your Honor.

THE COURT: All right. Give me - -

MR. BICKLEY: Your Honor - -

THE COURT: Thursday, July 30th, 9:00 o'clock. I'm sorry. October 30th, 9:00 o'clock.

MR. BICKELY: May I make one comment?

THE COURT: Yes.

MR. BICKLEY: Judge, with respect to the abilities or the need to have expert testimony dealing with the contentions of the plaintiff in this case, I would like to request did the Court give any consideration to the massive cases in the State of Wisconsin that said that when some things are so basic during the course of a trial that you don't need a legal expert to come in and testify for it, that a court can make a finding of fact based on the fact that whatever - -

THE COURT: Perhaps my findings were not clear. I indicated that the plaintiffs did not present expert testimony, credible expert testimony or other proof.

MR. BICKLEY: I see.

THE COURT: I don't believe there was any testimony during the course of this trail to the effect that there was anything neglected by any of these attorneys which was so obvious that it would constitute malpractice not to pursue it as the plaintiffs assert. The plaintiffs essentially argued, I should say essentially Mr. Zahran in this testimony essentially underscored what he believed Mr. Gooch had testified to. I don't believe that there was any testimony to the effect that any of these defendants did anything wrong. In fact, attorneys have a right to utilize certain, to follow certain tactics or to follow certain guidelines based upon their view of the evidence in the case.

There was nothing in this record to show that a summary judgment motion had to be filed in this case. There was nothing in this record to show, for example, that a motion in limini was compelled or that it would have been malpractice not to file a motion in limine. In fact, I think it's quite frankly an incredible stretch to assert that an attorney needed to file a motion in limine prior to the trail before Judge Curran or during the course of the trail before Judge Curran.

MR. BICKLEY: Even where one of the issues raised in the course of the trial, Your Honor, was the possible arson of the defendant, 49 times.

THE COURT: Even though that someone may have mentioned a fire in the case that did not require a motion in limine. A motion in limine could have been made or request for cautionary instructions could have been made but it certainly was not required. An attorney has a right to assess the situation as he or she sees it at the time. And as for the matter of trail tactics, an attorney could reasonably conclude that it would have been more injurious to underscore a point raided by the opposition than to proceed as you suggest.

MR. BICKELY: Thank you, sir.

THE COURT: 9:00 o'clock, October 30th. The Court does want to again emphasise that the foregoing constitutes its findings of fact and conclusions of law and it will enter partial judgment, judgment against the plaintiffs on their claim and in favor of the defendants. With respect to the remaining matter, the Court will proceed as indicated on October 30th at 9:00 o'clock. All right. I do just want to apprise Mr. Bickley of something else involving the unrelated case.

(Proceedings than held involving another case.)

THE COURT: I want to also say for the record back in case number 95-C-334, there were motion for summary judgment filed by virtue of this Court's decision with respect to the case. Those summary judgment motions are dismissed as moot. And I believe those are documents 169, 243 and 215. Thank you very much.

(Afternoon proceedings concluded at 3:02 p.m.)

* * *

Cynthia M. Bohman, Official Court Reporter for the United States District Court, Eastern District of Wisconsin, Milwaukee, Wisconsin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
OFFICE OF THE CLERK

SOFRON BL NEDIKSLY
CLERK

362 U.S. COURTHOUSE
517 E. Wisconsin Ave.
Milwaukee, WI 53202

RECORD TRANSMITTAL LETTER
March 30, 1999

Mr. Gino J. Agnello, Clerk
United States Court of Appeals
Seventh Circuit
219 S. Dearborn St.
Chicago, IL 60604

RE: **Zahran v. Schmidt, et al.**
**USCA No.: 98-2123. 97-3710**
**USDC No.: 95-C-334**

Dear Mr. Agnello:

Enclosed herewith please find the record on appeal in connection with the above-referenced case consisting of:

[6] Volumes of pleadings
[16] Loose pleadings
[20] Volumes of transcripts
[3] Exhibits - 3 boxes
[ ] Volumes in camera materials
[ ] Other

Please acknowledge date of receipt of the above referenced materials on the enclosed copy of this letter.

Very truly yours,

SOFRON B. NEDILSKY

Clerk, U.S. District Court

By

Holly Vila
Deputy Clerk, Appeals

Enclosure
cc: Robin Zahran, Christine Nelson
Charles Bohl, Terry Johnson

**United States Court of Appeals**
For the Seventh Circuit
Chicago, Illinois 60604

NOTICE OF ISSUANCE OF MANDATE

Date: May 6, 199

To: Sofron B. Nedilsky
United States District Court
Eastern District of Wisconsin
Room 362
517 E. Wisconsin Ave.
U.S. Courthouse & Federal Building
Milwaukee, WI 53202

From: Gino J. Agnello, Clerk

Re: 99-1780
Zahran, Robin v. Schmidt, Gerald G.
95 C 334, Charles N. Clevert, Judge

Herewith is the mandate of this court in this appeal, along with the Bill of costs, is any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to the costs shall constitute the mandate.

[X] No record file

[ ] Original record on appeal consisting of:

| Enclosed: | | To Be Returned At Later Date: |
|---|---|---|
| [ ] | Volumes of pleadings | [ ] |
| [ ] | Loose pleadings | [ ] |
| [ ] | Volumes of transcripts | [ ] |
| [ ] | Volumes of exhibits | [ ] |

[ ] Volumes of depositions [ ]
[ ] In Camera material [ ]
[ ] Other [ ]
Record being retained for us [ ]
in Appeal No.

Copies of this notice sent to: Counsel of record
[ ] United States Marshal
[ ] United States Probation Office

Note To Counsel:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

**UNITED STATES DISTRICT COURT**
**FOR THE**
**EASTERN DISTRICT OF WICSONSIN**

---

ROBIN ZAHRAN and
KAREN ZAHRAN,
Plaintiffs, Case No. 95-C-0334
v.
GERALD G. SCHMIDT, JR. ET AL.
Defendant.

---

DEPOSITION OF ROBERT C. BURRELL was taken at the instance of the Plaintiffs, under and pursuant to the provisions of Section 804.05 of the Wisconsin Statutes.



show you, would that refresh your memory?
A. You showed me a check for $20,000.
Q. And is it cashed?
A. Yes. Deposited.
Q. Did you receive any more money other than this $20,000?
A. I don't recall.
Q. And that $20,000 payment resulted from you collecting the 182,000 by Frankenmuth for both Robin Zahran and Karen Zahran?
A. Yes.
Q. Now, do you remember ever communicating with Frankenmuth attorneys that Karen Zahran is an innocent insured?
A. I think I took that position with them at one point.
Q. You did. Did you amend the complaint to reflect that?
A. No.

Q. Any reason?
A. Didn't need to.
MR. JOHNSON; Object. Vague.
BY MR. ZAHRAN:
Q. Now, you believed that Karen Zahran was an innocent insured; is that correct?
A. Innocent of what?
A. Of what facts?
Q. To prove any of the allegations that Frankenmuth is alleging or to defeat it?
A. I went into all of the positions that I felt Frankenmuth was taking at the time of their deposition.
Q. You did. And what did you find out through your own findings?
A. That question's too broad to answer.
Q. Did you find out that there was misrepresentation by Robin Zahran that supports the facts that are being alleged by Frankenmuth?
A. I took the position there was not a misrepresentation and it didn't occur and, on that basis, we got a payment for you.
Q. The 182,000?
A. Correct.
Q. Now, did you ever invoke the estoppel?
A. Yes.
Q. Principles?
A. Yes.
Q. In your pleadings?
A. Yes.
Q. Is that a defense?
A. Yes.
MR. ZAHRAN: We haven't been talking about that. That's something - - I'm driving to these

certain facts. I only ask questions after I present certain - -

MR. JOHNSON: I'm not going to start arguing with you. I make my objections, the witness answers, you go on and on. go ahead.

BY MR. ZAHRAN

Q. Go ahead.

A. The entire investigation and handling of the file and the documents that were filed on your behalf, including collecting on your behalf from Frankenmuth.

Q. You mean the $182,000?

A. You bet.

Q. Now, so you're saying that everything that you did in behalf of Karen and I was the proper thing to do at any given time?

A. Absolutely.

Q. No doubt about it?

A. Yes.

Q. Including the lawsuit, the $182,000, the representation with the fires, the way it is, allowing Frankenmuth to file for amendment of their complaint and failure to move for specific defenses

FRANKENMUTH POLICY PROVISION
REFERENCING MISREPRESENTAITON

CONDITIONS APPLICAPLE TO ALL COVERAGES

6. **Misrepresentation, Concealment or Fraud**

This entire policy is void if, whether before or after a loss:

a. An insured was willfully concealed or misrepresented:

(1) any material fact or circumstance concerning this insurance; or

(2) an insured's interest herein.

b. There has been fraud or false swearing by an insured regarding any matter relating to this insurance or the subject thereof.

CONDITIONS APPLICABLE TO ALL COVERAGES

Under Condition 4. . Change, Modification, or Waiver of Policy Terms, the following is added:

Knowledge by our authorized agent or material facts pertaining to this insurance is considered knowledge by us.

A failure by the insured to perform an act required under the policy will not affect our duties under this policy if the failure was caused by an act, statement, representation or omission by our authorized agent.

Under Condition 6. . Misrepresentation, Concealment or Fraud the following is added:

No misrepresentation or breach of affirmative warranty affects our obligations under the policy uniess.

1. We rely on it and it is material or it is made with intent to deceive or

2. The fact misrepresented or falsely warranted contributes to the loss.

No failure or a condition prior to the loss and no breach or promissory warranty affects our obligations under the policy unless it exists at the time of the loss and :

1. Increases the risk at the time of the loss: or
2. contributes to the loss.

This does not apply to non-payment or premium.

No failure or a condition prior to the loss and no breach or promissory warranty affects our obligations under the policy unless it exists at the time of the loss and :

1. Increases the risk at the time of the loss: or
2. contributes to the loss.

This does not apply to non-payment or premium.

NOV-4-1998 13:18 SHANNON & ASSOCIATES
312 332 0600 P.02/02

No. _____

---

IN THE
SUPREME COURT OF THE UNTIED STATES
OCTOBER TERM, 1998

---

ROBIN ZAHRAN and KAREN ZHARAN,
*Plaintiffs-Petitioners,*

v.

FRANKENMUTH MUTUAL INSURANCE COMPANY, THOMAS H. KOCOUREK, Sheriff of Manitowoc County, Wisconsin and his agents and representatives and the Corporation of Manitowoc County, Wisconsin, ROBERT ZEITNER, STEVEN L. POPUCH, and the LAW FIRM OF SWIFT, POPUCH & SINCLEAR,
*Defendants-respondents.*

---

ON PETITION FOR A STAY OF MATTERS PENDING IN THE UNITED STTES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

# PETITION TO JUSTICE JOHN PAUL STEVENS CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT TO STAY MATERS PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

ANDREW M. COHEN
Law Offices of Andrew M. Cohen
8 South Michigan Avenue, 26th Floor
Chicago, Illinois 60603
312/46-/8785

*Attorney for Plaintiffs-Petitioners*

CERTIFICATE OF FILING

I, Andrew M. Cohen, an attorney certify that I filed the within PETITION TO JUSTICE JOHN PAUL STEVENS CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT TO STAY MATTERS PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, by sending the same to the Clerk of the United States Supreme Court, Supreme Court Building, Washington, DC 20534, via Federal Express on October 30, 1998 before 5:00 p.m.

---

CERTIFICATE OF SERVICE

I, Andrew M. Cohen, an attorney certify that I filed the within PETITION TO JUSTICE JOHN PAUL STEVENS CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT TO STAY MATTERS PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, by personally delivering a copy to the United States Court of Appeals for the Seventh Circuit, and by placing a copy in the United States Mail before 5:00 p.m. on October 30, 1998, with proper first-class postage prepaid, addressed to the following counsel of record and/or parties:

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ST AVAILABLE COPY

Supreme Court, U.S.
FILED
JAN 19 2000
CLERK

No. 99-1042

IN THE

# Supreme Court of the United States

ROBIN ZAHRAN and KAREN ZAHRAN,

*Petitioners,*

*v.*

GERALD G. SCHMIDT, JR., Individually, and the law firm of SCHMIDT DARLING & IRWIN, and COREGIS INSURANCE COMPANY, Third-Party Defendant, and ROBERT C. BURRELL, Individually, and the law firm of BORGELT, POWELL, PETERSON & FRAUEN, and RELIANCE INSURANCE COMPANY, Third-Party Defendant, and MARJAN R. KMIEC, Individually, and the law firm of KMIEC LAW OFFICE, and he WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY, Third-Party Defendant,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS MARJAN R. KMIEC, KMIEC LAW OFFICE AND WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY

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*Counsel of Record*
CRAIG W. NELSON
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157369

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

## QUESTIONS PRESENTED FOR REVIEW

1. Did the plaintiffs waive the right to a jury trial by not timely requesting a jury trial, by not objecting to Judge Gordon's decision that there would be no jury trial, by not raising this issue on motions after verdict, or by not raising this issue in the Court of Appeals?

2. Are the district court's findings clearly erroneous, giving due regard to the district court's opportunity to judge the credibility of witnesses?

3. Have the lower courts properly interpreted Wisconsin law on misrepresentation in the context of a proof of loss submitted to an insurance company?

4. Have the lower courts properly interpreted Wisconsin law on the "innocent insured" doctrine?

5. Were the district courts' evidentiary rulings a proper exercise of discretion, and, in any event, would any evidence that was excluded have changed the result?

6. Did the courts below do anything improper with respect to the assignment of judges?

7. Were the plaintiffs denied a fair trial because of alleged prejudice of the lower courts?

8. Are the sanctions imposed against the Zahrans by the Seventh Circuit appropriate?

9. Was the district court's judgment in favor of Kmiec and against the Zahrans for breach of contract in the amount of $20,000 clearly erroneous giving due regard to the district court's opportunity to judge the credibility of witnesses?

## STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

Respondent, Wisconsin Lawyers Mutual Insurance Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Petition does not contain a statement on jurisdiction.

Jurisdiction in the district court was based on diversity of citizenship under 28 U.S.C. § 1332.

The court of appeals had jurisdiction under 28 U.S.C. § 1291 and this Court has jurisdiction under 28 U.S.C. § 1254.

## STATEMENT OF THE CASE

### A. Nature of the Case

This is a legal malpractice action commenced against three Wisconsin attorneys. The defendant attorneys represented the Zahrans in one of the several actions they commenced against Frankenmuth Mutual Insurance Company. In the action in question the Zahrans sued Frankenmuth for compensatory damages and bad faith as a result of Frankenmuth's alleged improper adjustment of a property damage claim arising out of a tornado or wind loss at a farm owned by the Zahrans in Wisconsin. Frankenmuth counter-claimed alleging misrepresentation in the filing of specific proofs of loss. Frankenmuth sought to void the policy and to recover from the Zahrans all sums paid by Frankenmuth as a result of the tornado.

The Zahrans were initially represented by the Fitzsimmons firm in Illinois, which started the action, and then, in turn, by Attorney Schmidt, Attorney Burrell and Attorney Kmiec. Mr. Kmiec was counsel for the Zahrans when the case was tried to a jury in the United States District Court for the Eastern District of Wisconsin, the Honorable Judge Thomas Curran presiding. During the trial

Frankenmuth offered $110,000 to settle that case. Attorney Kmiec recommended that the Zahrans settle, but his advice was rejected. Eventually, during the trial, Mr. Zahran gave Mr. Kmiec a handwritten note promising to pay him $20,000, win or lose. Mr. Zahran did this to get Mr. Kmiec to stop talking about settlement, and Kmiec did not discuss settlement with the Zahrans during the trial again.

At trial the Zahrans sought to recover compensatory damages well beyond the $182,000 which had been paid by Frankenmuth. Frankenmuth proved that the Zahrans' proofs of loss for the tornado became ever larger as time went by.

In December, 1991 the jury returned a verdict in favor of Frankenmuth, finding that the Zahrans had misrepresented their loss in their sworn proofs of loss. The trial court entered judgment dismissing the Zahrans' claim with prejudice. The Frankenmuth counter-claim was dismissed without prejudice.

Against Mr. Kmiec's advice, the Zahrans appealed *pro se*. The court of appeals affirmed the dismissal of the Zahrans' claims, and found that Frankenmuth should have been granted judgment on its counter-claim. As a result judgment was entered in favor of Frankenmuth and against the Zahrans in the sum of approximately $182,000.

On March 31, 1995, the Zahrans commenced this action against the three Wisconsin attorneys who represented the Zahrans in the wind storm loss. The Zahrans made a number of allegations against the defendant attorneys. None of these claims had any merit. They were simply the continuation of the Zahrans' habit and practice of pursuing meritless claims.

**B. Proceedings Below**

This case was tried to the court, the Honorable Charles Clevert, District Court Judge for the Eastern District of

Wisconsin, presiding, over several days during the summer of 1997. On September 23, 1997 the trial court issued an extensive oral decision finding in favor of the defendants. Judgment was entered on September 24, 1997, dismissing the Zahrans' claims with prejudice, and awarding judgment on Kmiec's counter-claim. Motions for reconsideration and motions to alter and amend the judgment were denied, and on April 10, 1998 the district court entered an amended judgment, again dismissing the Zahrans' claims and again granting judgment to defendant Kmiec on the counter-claim.

The Zahrans' appealed. The court of appeals issued its decision affirming the district on April 14, 1999. On August 19, 1999, the court of appeals issued an Order imposing sanctions upon the Zahrans. That Order was followed by an Amended Order imposing sanctions on September 7, 1999.

## C. Statement of Facts

The Petition's "Statement of Facts" and "Procedural History in the Courts Below" contain so many misstatements of fact that we doubt that we could thoroughly discuss each misrepresentation without presenting an extremely long submission. Therefore, we will merely set forth the following facts, the facts pertinent to the decisions below.

Karen and Robin Zahran have been married for twenty-two years, and neither has ever filed for separation or divorce. R. 390 p. 72.[1] Together they owned a farm in Denmark, Wisconsin, a home in Oak Brook, Illinois and a cottage in Door County, Wisconsin. R. 390 p. 72. They always filed joint tax returns. R. 390 p. 73.

---

1. Citations to the record indicate the record document number and the page.

Robin Zahran is an insurance agent, licensed to sell life, health, property and casualty insurance. He is familiar with taking applications for insurance. R. 389A pp. 76-77.

Mrs. Zahran had authority to write checks for the farm business, and for the insurance business. R. 390 p. 73. The Frankenmuth checks for the tornado loss designated her as one of the payees, and she did endorse some of those checks. R. 390 p. 73.

From approximately 1986-1988 the Zahrans had been insured through Kossuth Mutual Insurance Company. R. 389A pp. 78-79. Then the Zahrans were insured through American Family from approximately April 1988 through July 1988. Kossuth Mutual non-renewed the Zahrans, and American Family canceled them. R. 389A. p. 78.

The American Family application, signed by Mr. Zahran, in response to a direct question about prior claims, revealed one claim. In fact there had been nineteen claims under the Kossuth policy. R. 389A pp. 85-89.

After American Family canceled the Zahrans there was litigation in Brown County Wisconsin, involving the American Family application. R. 389A p. 99. After a trial the judge found that the American Family policy had been obtained by misrepresentation with respect to the claims history. R. 389A p. 97. That finding was upheld by the Wisconsin Court of Appeals in a decision rendered on October 16, 1991, two months before the jury verdict in the Frankenmuth tornado case. R. 389A p. 100. So court decisions finding misrepresentation by Mr. Zahran relating to insurance were of record before the trial in the tornado case.

In July 1988 the Zahrans became insured with Frankenmuth. R. 389A p. 77. In July 1990, approximately

nine months before the Zahrans ever met Mr. Kmiec, Frankenmuth canceled the Zahran's coverage. The were still uninsured at the time of the trial. R. 389A pp. 101-102.

The Zahrans sustained several losses to their farm while they were insured with Frankenmuth: a wind storm or tornado, and two fires. The tornado struck on May 24, 1989. The fires occurred after that, one on March 18, 1990 and another in July 1990. Several of the arguments made by the Zahrans require some understanding of the timing of these losses, the timing of the proofs of loss submitted to Frankenmuth, and the timing of the commencement of the Zahran lawsuits against Frankenmuth.

The lawsuit against Frankenmuth arising out of the 1989 tornado loss, was filed in March 1990, before the March 18, 1990 fire at the Zahrans' farm. The Frankenmuth answer and counter-claim in the tornado case alleging misrepresentation was filed in April 1990, before any proofs of loss were filed as a result of either of the fires. R. 383, Trial Ex. 403. Even the plaintiffs' expert, Mr. Gooch, acknowledged that the allegations of misrepresentation in Frankenmuth's pleadings in the tornado case arose out of the proofs of loss submitted for the tornado loss, not the fire loss as Mr. Zahran has so frequently contended. R. 380 p. 106-109.

Robin Zahran admitted that none of the defendant attorneys assisted in any way in the preparation of the proofs of loss in the tornado case. R. 389A pp. 104-106. The July 25, 1989 proof of loss made claims for approximately $240,000. R. 389A p. 108. In the summer of 1989 Frankenmuth made payments of approximately $161,000, leaving a claim that should have been for about $78,000 as of August 1989. R. 389A pp. 108-118. But in September 1989 the Zahrans submitted a proof of loss, not for $78,000, but for $180,000. R. 389A pp. 122-126. By letter dated

September 22, 1989 the Zahrans advised Frankenmuth that their claim had grown to $314,000. R. 389A pp. 128-132.

Mrs. Zahran signed the proofs of loss dated in July and September 1989, and she said she thought that they truly and accurately reflected the losses sustained by her and her husband. R. 390 pp. 48-49. She agreed with the damages claimed in the September 22, 1989 letter from her husband to Frankenmuth. R. 390 pp. 74-77. Mrs. Zahran has never disavowed the proofs of loss, or in anyway indicated that she disagreed with the damages claimed on the proofs of loss. R. 390 p. 79.

The Zahrans jointly agreed to bring a lawsuit against Frankenmuth for the tornado claim. R. 390 pp. 76-77. Mrs. Zahran had direct interaction with the defendant attorneys. R. 390 p. 77 On the occasions when her husband spoke with the defendant attorneys he was authorized to speak on her behalf. R. 390 pp. 86-87.

Attorney Joan Slezak commenced the fire litigation for the Zahrans against Frankenmuth in the spring of 1991, and she remained the attorney of record until April 1992, at which time the Zahrans proceeded *pro se*. R. 389A pp. 144-147. Karen and Robin Zahran ended up trying the fire case together, *pro se*. R. 390 pp. 84-85.

**D. Testimony of Thomas Gooch**

Mr. Gooch was admitted to practice law in Illinois in 1979. He is not licensed to practice law in Wisconsin, or in any state other than Illinois. R. 380 pp. 5, 10, 138. He has tried one case in Wisconsin. R. 380 pp. 13, 104.[2] If he has a

2. One ironic and telling fact in this case is that the individual plaintiffs, Robin and Karen Zahran, had, at the time of the trial in this case, already tried the fire case twice, *pro se*. They had more trial experience in Wisconsin than their expert.

case venued in Wisconsin, he typically refers that to Wisconsin counsel. R. 380 p. 104. Mr. Gooch has been a very good friend of Mr. Bickley, counsel for the Zahrans in this case, for a number of years. R. 380 p. 105.

Mr. Gooch testified that in his opinion the defendant attorneys all had a conflict of interest, because, in his opinion, Mrs. Zahran was an "innocent insured" under Wisconsin law. R. 380 pp. 119-121, 124-125. He acknowledged that if his opinion on Wisconsin law regarding innocent insured was wrong then that would certainly go to the weight that the court would put on his other opinions. R. 380 p. 126. He admitted that if Mrs. Zahran did not qualify as an innocent insured then his criticism of the defendant attorneys on the conflict of interest issue would be unfounded. R. 380 p. 128.

**E. Testimony of Marjan Kmiec**

Mr. Kmiec was retained to represent the Zahrans in the tornado case, not in the case arising out of the fires. R. 389 pp. 6-7, 32.

Mr. Kmiec testified that in Wisconsin, under the *Tempelis* case, an insurance company need not show reliance in order to void a policy, if there is misrepresentation on a proof of loss. R. 389 p. 46.

Mr. Kmiec was aware of the "innocent insured" rule, but he did not believe it applied to the Zahrans. R. 389 p. 24. Mrs. Zahran never disagreed with the proofs of loss or any of the supporting documents. She never indicated that she thought she was entitled to some damages different from what was claimed by Mr. Zahran. R. 389 p. 25.

During the trial Frankenmuth offered $110,000 to settle the case. Mr. Kmiec repeatedly strongly recommended that the Zahrans take the settlement, but Mr. and Mrs. Zahran

decided to reject the settlement. R. 389 pp. 40-42. Mr. Zahran drafted and signed a note indicating that he would pay Mr. Kmiec $20,000, win or lose, to get him to stop discussing settlement. R. 389 pp. 41-42, R. 381 pp. 6-8.

**F. Testimony of Ward Richter**

Mr. Richter, a Wisconsin attorney, was called as an expert on behalf of Mr. Kmiec. He testified that the innocent insured doctrine did not apply to Karen Zahran under Wisconsin law. R. 393 pp. 107-112. The defendant attorneys did not have a conflict of interest in representing both Mr. and Mrs. Zahran in the wind loss claim. R. 393 p. 112.

As to the reliance issue, it was Mr. Richter's opinion that if an insurer can prove intentional misrepresentation on a proof of loss then the insurer can void the policy without regard to reliance under Wisconsin law. R. 393 pp. 117-120. Mr. Richter testified that an argument could be made that the policy in question was ambiguous, but to make that argument you would have to ignore the Wisconsin law that was on the books, *Tempelis* and *Walker*. R. 393 pp. 64-67.

**G. Testimony of Robin Zahran**

Mr. Zahran admitted that the written contingency fee agreement with Mr. Kmiec, signed only by Mr. Zahran, also applied to Karen. R. 389A p. 144. Mr. Zahran admitted that he gave the note to Mr. Kmiec, promising to pay him $20,000 win or lose, in order to get Mr. Kmiec to stop talking about settlement. R. 389A pp. 149-150.

As part of the damages claimed against the defendant attorneys, Mr. Zahran claimed that the finding of misrepresentation in the Frankenmuth tornado case caused his inability to get insurance coverage. R. 389A p. 99. However, there were other reasons why he was uninsured,

and they pre-dated the tornado trial, as indicated above. By the time the tornado case went to trial there was already a finding by a court of record that he had been guilty of misrepresentation on an insurance application. R. 389A p. 100.

As part of the damages in this case Mr. Zahran alleged that the actions of the defendant attorneys, and the loss of the Frankenmuth tornado trial, caused damage to his credit. R. 389A p. 153. However, before the Zahrans ever met Mr. Kmiec the Old Kent Bank had started a foreclosure action against the Zahrans' residence in Illinois. True to form, the Zahrans counter-claimed, alleging that the bank had damaged them personally and professionally, and had damaged their credit reputation. R. 389A pp. 153-155. Before the Zahrans ever met Mr. Kmiec, William Radue started a foreclosure against property owned by the Zahrans in Manitowoc County, Wisconsin. R. 389A pp. 156-159.

The Zahrans commenced a suit against Providence Washington Insurance Company alleging failure of Providence Washington to pay property damages as a result of a wind loss to their home. Again, the Zahrans alleged damage to their credit reputation. R. 389A p. 159.

This case is not the first case of legal malpractice commenced by the Zahrans. The tornado litigation was commenced by the Fitzsimmons law firm in Illinois and that firm brought an action against the Zahrans for failure to pay fees. Robin Zahran counter-claimed alleging legal malpractice. R. 389A pp. 162-164; Exs. 448A and 448B.

Attorney James Presentin of Green Bay, Wisconsin represented the Zahrans, and had to sue them for fees. The Zahrans counter-claimed alleging malpractice. R. 389A pp. 166-167; Ex. 451.

At trial Mr. Zahran testified under oath in front of Judge Clevert that he had never, prior to the trial, lied under oath. In fact, he had lied under oath in a deposition on May 11, 1984 in the case of *Thomas Buchinger v. Robin Zahran*. Mr. Zahran had never received a degree from a university in the United States, but he testified under oath that he had gone to MIT in Boston and had obtained a degree in math and physics in 1973. R. 389A pp. 172-174.

## SUMMARY OF ARGUMENT

The Zahrans have made no showing that the case is worthy of this Court's review. They have not addressed the criteria employed by the Court in passing on petitions for writs of certiorari.

The Zahrans contend that they were denied a jury trial, when, as will be seen below, they waived their right to a jury trial.

This was a trial to the court. Under Wisconsin law the legal malpractice alleged by the Zahrans required that the Zahrans present expert testimony. One of the principal issues for the fact finder was the credibility of the expert witnesses. The trial court found the testimony of the Zahrans' expert to be unworthy of belief, and adopted the defense experts' opinions. The court of appeals recited the reasons why the district court found the plaintiffs' expert's opinions to be unworthy, and stated that there was abundant support in the record for this finding. Court of Appeals Order dated April 14, 1999, page 3.

All of the other arguments presented are a rehash of arguments previously made by the Zahrans in this and other cases. It generally comes down to the Zahrans' favorite theory: if they lose they have been the victim of fraud or prejudice. The purveyors of "prejudice" now include not only

Frankenmuth, the Manitowoc County Sheriff's Department, (R. 171, Ex. 21) and the defendant attorneys, but also Judge Clevert and the judges of the Seventh Circuit. Those guilty of "fraud" include not only everyone associated with Frankenmuth, and the defendant attorneys, but now also Attorney Cohen, the Chicago attorney who tried to help the Zahrans with their appeal. Petition p. 11.

The court of appeals was exactly correct when it said "It is time for this endless litigation to stop." Court of Appeals Order dated September 7, 1999, page 3.

## REASONS FOR DENYING THE WRIT

## I.

## STANDARD OF REVIEW.

In cases tried to the court:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Fed. R. Civ. P. 52(a).

The district court's findings of fact should not be set aside unless they are "clearly erroneous." *See Clark v. Universal Builders, Inc.*, 706 F.2d 204 (7th Cir. 1983), citing *Holman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982). The appellate court gives "substantial deference" to the findings of the district court, especially where the district court decided the credibility of witnesses. *Clark, supra*, 706 Fed. 2d at 206, citing *Apolskis v. Concord Life Insurance Company*, 445 F.2d 31, 34 n.1 (7th Cir. 1971).

## II.

## THE PETITION DOES NOT IDENTIFY ISSUES THAT MEET THE CRITERIA FOR GRANTING A WRIT OF CERTIORARI.

The Zahrans have made no effort to demonstrate that this case meets any of the criteria used by this Court in exercising its discretion on petitions for writs of certiorari. *See* Supreme Court Rule 10. There is no suggestion that the decision of the court of appeals is in conflict with decisions of another court of appeals. Nor is there any *genuine* effort to demonstrate that the court of appeals decision is in conflict with decisions of the Wisconsin Supreme Court. The allegations to this effect actually misrepresent Wisconsin law. We will address each section of the Petition in turn.

The first section of the Petition asserts that the Zahrans were improperly denied a jury trial. As will be seen below, they waived a right to a jury trial by not requesting a jury trial until the case had been pending for more than two years, when trial was only five weeks away. In addition, this is an issue that was not preserved in the court of appeals.

In the second section of their Petition, the Zahrans contend that the lower courts "defected" from Wisconsin law on "expert's malpractice." Here, they discuss the alleged opinions of their expert, and argue that their expert should have been believed. The Zahrans argue nothing other than alleged erroneous factual findings or the misapplication of a properly stated rule of law. Even if these assertions had some merit, they would not warrant the granting of the Petition. *See* Supreme Court Rule 10.

The third section of the Petition contains an argument that the courts below have not properly applied Wisconsin law on some insurance questions. In particular, the Zahrans

contend that the courts below have improperly interpreted or applied the rule of *Tempelis v. Aetna Casualty & Surety Co.*, 164 Wis. 2d 17, 27, 473 N.W.2d 549 (Ct. App. 1991), *affirmed and modified on other grounds*, 169 Wis. 2d 1, 485 N.W.2d 217 (1992). The lower courts have properly applied Wisconsin law. The Zahrans persist in seeking an improper application of the law. In any event, alleged improper application of an established rule of law is insufficient to warrant this Court's review.

The fourth section of the Zahrans' Petition alleges impropriety in the assignment of the trial judge and the panel of circuit judges in the Seventh Circuit. However, there is no explanation as to why or how the alleged improper assignment was made. The Zahrans rely upon nothing but bald assertions of prejudice and abuse. These allegations are typical of the unsubstantiated and irresponsible allegations frequently made by the Zahrans during their numerous litigations. They should be ignored.

The Zahrans have set forth no reasons to grant the petition, and it should be denied.

## III.

## THE ZAHRANS WAIVED THEIR RIGHT TO A JURY TRIAL, AND WAIVED ANY ARGUMENT RELATING TO THE DENIAL OF A JURY TRIAL BY FAILING TO RAISE THIS ISSUE IN THE COURT OF APPEALS.

The first paragraph of the argument in the Petition is such a blatant attempt at deception that it warrants reproduction here.

> The subject complaint was originally assigned to Judge Gordon who granted Zahrans' motion to file their amended complaints in February, 1997.

> Karen Zahran filed her amended complaint and demanded a jury trial per Rule 38(b). Judge Clevert was substituted for Judge Gordon. He immediately struck the jury demand the first time he held a hearing to familiarise [sic] himself with up to date history of the case. Zahrans objected to his striking the jury demand and the court denied their objections.

Petition p. 12.

Actually Judge Gordon decided there would be no jury trial. He made that ruling in October 1996, when the case had been pending for 19 months without a jury demand. An amended complaint, filed in February 1997 by Robin Zahran did *not* contain a jury demand. Karen Zahran's Third Amended Complaint was not filed until May 1997, and it was eventually struck because she did not have leave of court to file that pleading at that late date. Judge Clevert received a motion for a jury trial when the case was five weeks away from trial, and had been pending for more than two years. He found that any right to a jury trial had been waived, and, under the circumstances, that decision was certainly a proper exercise of discretion.

The above quoted passage from the Petition was clearly designed to suggest something other than what really happened, not an uncommon occurrence in Zahran litigation. Below we will set forth the detailed history on this issue, with citations to the record.

The initial Complaint, filed on March 31, 1995, contained no request for a jury trial. (R. 1). The defendants' Answers did not contain a request for a jury trial. (R. 4, 8). Kmiec filed counterclaims and the Zahrans responded, and none of those pleadings contained a demand for a jury. (R. 19, 26). The Amended Complaint filed on December 7,

1995, did not contain a request for a jury trial. (R. 27). The responses to the Amended Complaint did not contain a demand for a jury trial. (R. 32, 34, 37). The Second Amended Complaint filed on September 25, 1996, did not contain a request for a jury trial. (R. 95). The answers to the Second Amended Complaint did not contain a request for a jury trial. (R. 98, 99, 100 ).

During a status conference on October 7, 1996, Judge Myron Gordon repeatedly stated that the trial would be a court trial, not a jury trial, because no one had asked for a jury trial. (R. 104, pp. 19-20, 22, 25.) Attorney Bickley, appearing on behalf of the Zahrans, made no objection.

Another Amended Complaint was filed by plaintiff, Robin Zahran, on February, 4, 1997. (R. 132). It did not contain a jury demand. The defendant's answers to that pleading did not contain a jury demand. (R. 138, 140, 135).

On May 2, 1997, Judge Charles Clevert reiterated that this would be a court trial, not a jury trial. (R. 231, pp. 139-143.) At that point the case was scheduled for a court trial to begin on June 30, 1997, less than two months away.

On May 9, 1997, Karen Zahran filed a Third Amended Complaint with a demand for a jury trial. (R. 236). Then, by motion dated May 20, 1997, Karen Zahran moved for trial by jury. (R. 241). This was five weeks before the commencement of the trial. The court found that Karen Zahran had waived her right to a jury trial and that she had not been given permission to file a Third Amended Complaint at such a late date. (R. 264).

The Zahrans did not raise this jury trial issue in the court of appeals. Their first brief in the court of appeals did not address this jury trial issue. Then the Zahrans were given time to file a supplemental brief, but the brief was filed late.

The court denied the Zahrans' motion to file that brief late, so the supplemental brief was never properly filed.

The respondents' briefs responded to the original brief, the only one which had been properly filed, and since it did not address the jury trial issue, the response briefs did not address this issue.

In their reply brief, the Zahrans, for the first time in a properly filed brief, raised the issue of the denial of a jury trial. Obviously, raising this issue in the reply brief, when it had not been raised in the initial brief, or addressed by the respondents' briefs, was inappropriate, and insufficient to preserve the issue for further appeal. Since the properly filed briefs before the court of appeals did not address the issue the decision of the court of appeals did not address the jury trial issue.

This jury trial issue was waived in the trial court and was not preserved on appeal.

## IV.

## THE TRIAL COURT CORRECTLY APPLIED WISCONSIN LAW ON LEGAL MALPRACTICE CASES AND THE PLAINTIFF'S NEED FOR EXPERT TESTIMONY.

The elements of a legal malpractice case in Wisconsin are set forth in *Lewandowski v. Continental Casualty Co.*, 88 Wis. 2d 271, 277, 276 N.W.2d 284 (1979), as follows:

> In an action against an attorney for negligence or violation of duty, the client has the burden of proving the existence of the relation of attorney and client, the acts constituting the alleged negligence, that the negligence was the proximate

> cause of the injury, and the fact and extent of the injury alleged. The last element mentioned often involves the burden of showing that, but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action.

*Lewandowski*, 88 Wis. 2d at 277-276.

In *Lewandowski* the Wisconsin Supreme Court stated that:

> Regardless of the approach used to resolve the issue of liability and damages in a legal malpractice case the ultimate goal should be to determine what the outcome should have been if the issue had been properly presented in the first instance.

*Lewandowski*, 88 Wis. 2d at 281, 276 N.W.2d 284.

These principles were reiterated in *Helmbrecht v. St. Paul Insurance Co.*, 122 Wis. 2d 94, 362 N.W.2d 118 (1985). On the need for expert testimony, the *Helmbrecht* court stated:

> Expert testimony is generally necessary in legal malpractice cases to establish the parameters of acceptable professional conduct, given the underlying fact situation. Expert testimony is not required in cases where the breach is so obvious that it may be determined by the court as a matter of law or where the standard of care is within the ordinary knowledge and experience of the jurors.

*Helmbrecht*, 122 Wis. 2d at 111-112.

In this case the alleged negligence is not obvious, and the standard of care is not within the ordinary knowledge and experience of jurors. The district court specifically so held. R. 337 pp. 26-28. On each item of alleged negligent conduct the Zahrans had to present the testimony of an expert.

The Zahrans' expert on legal malpractice was Thomas Gooch, a long time very good friend of Mr. John Bickley, the Zahrans' attorney. Mr. Gooch and Mr. Bickley are both from Illinois. Mr. Gooch had tried one case in Wisconsin. Mr. Gooch testified at trial, expressing a variety of opinions adverse to the defendants.

The district judge specifically found that this case was "in large measure about credibility." R. 337 p. 3. The court found that the testimony of Thomas Gooch, the plaintiffs' expert, was not worthy of belief. R. 337 p. 15. The district judge rendered an extensive oral decision, making findings that were in accord with the testimony of the defendants and their experts, not the testimony of the Zahrans' expert. The district court found that the Zahrans had failed to demonstrate that the result in the tornado trial would have been different if that trial had been handled as the Zahrans suggested at the trial in this case. R. 337, p. 23.

The Zahrans argue that even though the trial court found Mr. Gooch's testimony to be not worthy of belief, the Zahrans should have prevailed because the alleged failures of the defendant attorneys were within the area of common knowledge and lay comprehension. Petition p. 15. That simply is not the case, and the trial court so found. R. 337 p. 27.

The decision in favor of the defendants is a result of the trial court's evaluation of the credibility of the experts. It is clearly a correct result, and not in any sense clearly erroneous.

The court of appeals affirmed, correctly giving deference to the trial court's findings on the credibility of the witnesses.

## V.

## WHETHER FRANKENMUTH RELIED ON THE ZAHRANS' MISREPRESENTATIONS WAS NOT AN ISSUE IN THIS CASE UNDER WISCONSIN LAW.

The Zahrans contend that all of the defendant attorneys were negligent for not arguing that Frankenmuth could not prevail on the counterclaim, because Frankenmuth could not prove reliance on the Zahran misrepresentations. Petition pp. 17, 20. The argument is that in making its payments Frankenmuth did not rely upon the Zahrans' proofs of loss, and, therefore, Frankenmuth should not have been permitted to assert misrepresentation. This argument has consistently failed, for good reason. Reliance is not an element required to establish material misrepresentation in a proof of loss. *Tempelis v. Aetna Casualty & Surety Co.*, 164 Wis. 2d 17, 27, 473 N.W.2d 549 (Ct. App. 1991), *affirmed and modified on other grounds*, 169 Wis. 2d 1, 485 N.W.2d 217 (1992). The court of appeals, in its opinion in the underlying tornado litigation, stated that Frankenmuth did not have to prove reliance in order to defeat the Zahrans' claim, citing *Tempelis*. *Zahran v. Frankenmuth Mutual Ins. Co.*, 19 F.3d 1436, 1994 WL 107909 (7th Cir. Wis.); R. 383, Ex. 84, footnote 1, page 4. The Zahrans nonetheless made the same arguments to the same court in this case.

The *Tempelis* decision is but one expression by Wisconsin courts holding that reliance is not necessary to void a policy. *See also American Casualty Company of Reading, PA v. Cianciolo, Inc.*, 987 F.2d 1302 (7th Cir. 1993), citing *Dohman Company v. Niagara Fire Insurance Company*, 96 Wis. 38, 71 N.W. 69 (1897); *Stebane Nash Company v. Campbellsport Mutual Insurance Company*,

27 Wis. 2d 112, 124, 133 N.W.2d 737 (1965). The *Tempelis* policy provided for the voidance of the contract of insurance upon concealment or fraud in "any material fact or circumstance." *Tempelis*, 164 Wis. 2d at 27. Here, the Frankenmuth policy is void if the insured has willfully concealed or misrepresented any material fact or there has been fraud or false swearing by an insured regarding any matter relating to the insurance. The policy clearly allows the policy to be declared void absent any reliance. An Amendatory Endorsement for Wisconsin added the following language to the Zahran's policy:

> No misrepresentation or breach of affirmative warranty affects our obligation under the policy unless:
>
> 1. we rely on it and it is material or it is made with intent to deceive; or
>
> 2. the fact misrepresented or falsely warranted contributes to the loss.

R. 383, Trial Exh. 2.

The Zahrans' policy is virtually identical to the *Tempelis* policy. Because of the policy provisions and the law in Wisconsin, reliance on misrepresentations in the Zahrans' proofs of loss was never an issue in the tornado case. The claim that the defendant attorneys should have pursued this legally vacant argument is without merit. It is an argument that could only be supported by someone obviously unfamiliar with Wisconsin law, such as Mr. Gooch.

## VI.

## THE ATTORNEYS REPRESENTING THE ZAHRANS DID NOT HAVE A CONFLICT OF INTEREST BECAUSE OF THE "INNOCENT INSURED" DOCTRINE.

Under Wisconsin law, an "innocent insured" is entitled to recover benefits from an insurance policy triggered by the wrongful conduct of another insured only under strictly defined and limited circumstances. *See Hedtcke v. Century Insurance Company*, 109 Wis. 2d 461, 326 N.W.2d 727 (1982), *State Farm Fire and Casualty Insurance v. Walker*, 157 Wis. 2d 459, 459 N.W.2d 605 (Ct. App. 1990). In *Hedtcke* the Wisconsin Supreme Court ruled that an "innocent insured" should not be saddled with the wrongdoing of another that might void the policy. The court specifically noted that even if the court was able to distinguish between the acts of the wrongdoing insured and the innocent insured, the "innocent insured" rule would not apply if the wrongdoing insured would benefit from the recovery by the innocent insured. *Hedtcke*, 109 Wis. 2d at 489.

When the subject conduct involves fraud *after* the loss, as opposed to the cause of the loss, the innocent insured rule does not apply. *Walker*, 157 Wis. 2d at 463.

Karen Zahran was not an "innocent insured." In fact, this whole argument was abandoned during the trial. After the court and the parties spent innumerable hours on the alleged conflict of interest/innocent insured contention, Karen Zahran's attorney finally admitted that the innocent insured argument was without any factual support. R. 390 pp. 141-148.

Even before this action was *filed* the Seventh Circuit had concluded that the Zahrans' innocent insured argument had no merit.

> There is, incidentally, a good reason why the innocent insured argument was not made. In *Hedtcke* the court noted that the trial court would have the authority to see that the wrongdoer insured would not benefit from the proceeds; something easy to do in *Hedtcke* because the guilty insured was hostile to the innocent insured and may have damaged the property to hurt her. (Judith Hedtcke, the innocent insured, had vacated the marital home, initiated divorce proceedings and obtained a court order directing Ronald Hedtcke to vacate the premises. Ronald, who later pled guilty to arson, burned the property three days before he had to vacate it). We do not see how it could be done in this case, and we suspect that the Zahrans' counsel also did not see how Karen Zahran could be paid without conferring some benefit on Robin Zahran.

*Zahran v. Frankenmuth*, Case No. 92-1778, 92-1848 (7th Cir., March 28, 1994), *reh'g denied*, June 9, 1994.

After that passage was written the trial court and the parties still spent much time and effort on this issue, only to have it abandoned. The fact that this is still being argued is proof positive of the Zahrans' propensity to advance "frivolous arguments" in an effort to "re-litigate their case on appeal." Court of Appeals Order, September 7, 1999, p. 3.

The Frankenmuth counterclaim was based upon the sworn proofs of loss signed by Karen Zahran. R. 383, Trial Ex. 403. Karen Zahran represented that the damages claimed were true and accurate. R. 390 pp. 74-77. She participated in the misrepresentation.

Even if she had not participated in the misrepresentation, the policy would still be voided. The fact is that Karen could not recover without some benefit going to Robin Zahran. The Zahrans' innocent insured argument never was viable, and the defendant attorneys could not be negligent for not raising the issue.

## VII.

## THE JUDGES BELOW WERE PROPERLY ASSIGNED TO THE CASE, AND THEY WERE NOT PREJUDICED AGAINST THE ZAHRANS, OR MOTIVATED BY REVENGE AGAINST THE ZAHRANS.

The Petition contains several references to alleged prejudice and abuse by Judge Clevert and the Seventh Circuit. *See* Petition pp. 17, 22, 23, 24, 25, 27 and 28. For example, the Zahrans have suggested that the Seventh Circuit was exercising "revenge against Zahrans" or are acting "pursuant to some other motive." Petition pp. 27-28. These statements are preposterous, of course, but they do provide a thumbnail sketch of the world according to Zahran: if they do not get what they want, they have been victimized by prejudice.

The Zahrans state that the lower courts "displaced the law of the State of Wisconsin and inserted their own without support of legal precedence . . . ." Petition p. 24. There is, not surprisingly, no specificity with respect to this charge. Similarly, it is alleged that Judge Clevert and the Seventh Circuit "totally ignored Wis. Law referencing reliance, estoppel, innocent insured, policy provisions governing the contract . . . ." Petition p. 24. This assertion is based on Zahrans' incorrect interpretation of Wisconsin law, an interpretation that has been repeatedly addressed and rejected by the courts below.

The attacks on Judge Clevert consist of nothing but vague generalities, with two exceptions. The Zahrans allege that Judge Clevert was "loud, mad, and threatening to hold Karen Zahran's attorney in contempt" and they contend that Judge Clevert's "striking" of the jury demands was a premeditated intentional act, somehow wrongful. *See* Petition p. 26. The jury demand issue has been dealt with above, and will not be revisited at this point.

As to the other allegation, the threat of contempt, there was, in fact, one point during the trial when Judge Clevert did threaten to hold Karen Zahran's attorney in contempt. That threat was entirely warranted, and the judge's exasperation was tied to one of the main issues in the case.

Attorney John Bickley had been counsel for Robin and Karen Zahran. He withdrew from representing Robin, and continued to represent Karen Zahran through the trial. The pretext was that the Zahrans had different interests, and an attorney might have a conflict of interest in representing the two of them, just as the defendant attorneys allegedly had a conflict when they had represented both of the Zahrans. However, this was nothing but a subterfuge whereby Mr. Zahran and his wife were given separate opportunities to present and cross-examine witnesses.

As the trial went on it became very clear that there was no divergence of their interests. They cooperated with each other at every turn, just as they always had. It got to the point where Mr. Bickley was making objections that did not involve his client, Karen Zahran, but only related to Robin Zahran. The trial dragged on because Mr. Zahran and Mr. Bickley were both given opportunities to examine, when, as it turned out, that really should not have been allowed. (In the end Mr. Bickley acknowledged that there was no factual basis for the innocent insured argument. R. 390 pp. 141-148) Mr. Bickley was clearly taking positions

favorable to Mr. Zahran, even interposing objections that were clearly not properly made as to the interests of his client, Mrs. Zahran. When Mr. Bickley persisted in making objections relating to Robin Zahran's case, the judge cautioned Mr. Bickley in no uncertain terms. The judge took pains to explain why he was troubled by Mr. Bickley's objections, and his concern went right to the question of whether the Zahrans were attempting to manipulate the situation by contending that Mr. Bickley was only protecting the interests of Mrs. Zahran. (R. 389A pp. 162-167).

Judge Clevert's statements were not an indication of prejudice or ill will. His statements reflected the legitimate concern that his courtroom was being improperly used as a forum for the Zahrans to continue their interminable, vexatious, meritless litigation, now through a subterfuge that gave Robin Zahran free reign to rail as he pleased, without risk, since his interests were still being represented by Mr. Bickley.

Finally, the Zahrans never asked that Judge Clevert recuse himself. This bias and prejudice argument has arisen after the Zahrans lost the case. Certainly it is not proper for a party to litigate the case to conclusion, without suggesting recusal, and then contend, after the case is lost, that the judge was biased and should have recused himself.

## VIII.

## THE TRIAL COURT PROPERLY EXERCISED DISCRETION OVER THE ADMISSION OF EVIDENCE.

The Zahrans' Petition contends that the Zahrans were improperly refused the opportunity to prove certain matters at trial. The district court gave the Zahrans every opportunity to explain why the court should permit certain evidence. *See, e.g.*, R. 392, pp. 4-23, 47-53. The Zahrans could not

state a valid reason for allowing the evidence, so the evidence was not admitted. The trial court's evidentiary rulings were all well within the bounds of discretion of a trial judge. We will briefly address a few of such rulings.

**A. The Pre-Trial Orders Relating to the Opinions of Mr. Gooch.**

Various district court orders required the pre-trial disclosure of the names of experts and expert reports. The Zahrans produced a report from Thomas Gooch. At the pre-trial conference, when various motions were argued, the court heard extensive arguments concerning the opinions to be offered by Mr. Gooch at trial. The court ruled that the opinions to be offered by Mr. Gooch at trial would be limited to those opinions disclosed in Mr. Gooch's report. (R. 312). At various times during the trial the court, consistent with that ruling, limited the opinions of Mr. Gooch, and limited the presentation of evidence from other witnesses, when the proof would not have been in furtherance of or related to any of Mr. Gooch's opinions. *See, e.g.*, R. 380 pp. 69, 75, 98-99, 107-110. This was proper since the Zahrans needed expert testimony to prove their case, and there was no reason to allow evidence supporting alleged theories that were not the subject of an expert opinion.

**B. The Pre-Trial Order Relating to Evidence of Alleged Conspiracy.**

Mr. Zahran blames all of his attorneys for not asserting a conspiracy theory, and for not making it a part of the tornado case. The trial court properly excluded Mr. Zahran's proffered testimony about these subjects, but the Zahrans still contend that they should have been allowed to prove a conspiracy. Petition p. 26. During discovery Mr. Zahran did not produce any evidence of a conspiracy. After a hearing the court properly precluded Mr. Zahran from using this trial as a forum

for his conspiracy theory. R. 312 p. 26. The court's decision on this was proper for a variety of reasons.

First, the conspiracy theory had no merit. The Zahrans had previously been given wide latitude in their effort to prove that Frankenmuth and others were involved in a conspiracy to harm the Zahrans. Their efforts in that regard had been totally unsuccessful. The conspiracy theory was heard and dismissed in the fire case, a case the Zahrans tried *pro se*, and in the subsequent case they brought against Frankenmuth and the Manitowoc Sheriff's Department. Courts repeatedly ruled that there was no evidence to support these claims. (R. 171, Exhibits 16, 17, 21). The trial court in this case was not required to give the Zahrans yet another opportunity to raise these meritless allegations.

Second, evidence about this conspiracy theory was irrelevant. The Zahrans had no expert opinion to the effect that the conspiracy theory could have been proved, or that trying to prove the theory would have made any difference in the underlying case. Without such an opinion there was no reason to admit the Zahrans' opinion testimony that there was a conspiracy involved in the adjustment of their claims.

### C. The Trial Court's Exclusion of the Witnesses from the Underlying Case was Proper.

The Zahrans contend that they should have been allowed to call witnesses from the underlying trial as witnesses in this case. Robin Zahran wanted to call these witnesses for the stated purpose of showing that Mr. Kmiec had done "inadequate and improper cross-examination" at the tornado trial. Petition p. 26. The district court gave Robin Zahran every opportunity to state how the evidence would have related to Mr. Gooch's opinions. Robin Zahran was unable to state that there was any connection between the anticipated testimony and his expert's opinions. Therefore the court

excluded the witnesses. R. 392 pp. 4-33, 45-53; R. 393 pp. 3-19.

The district court was absolutely correct. The general statement that Mr. Kmiec was "inadequate" or "unprepared" for trial had not been mentioned by Mr. Gooch in his expert report, and Mr. Gooch did not testify to any such opinion. Since none of the testimony to be obtained from the witnesses seemed to matter, the court's discretion was exercised in an attempt to limit the time spent in this trial.

## IX.

## THIS COURT SHOULD HAVE NO INTEREST IN REVIEWING THE CONTRACT ISSUE BETWEEN KMIEC AND THE ZAHRANS, BUT IN ANY EVENT JUDGMENT IN FAVOR OF KMIEC WAS PROPER.

In the fifth section of their argument the Zahrans assert that the district court should not have granted judgment in favor of Mr. Kmiec on his counter-claim. These are the same arguments made by the Zahrans at trial and on post-trial motions. The arguments have no merit, and the Zahrans cite no legal authorities in support of the argument.

First, no new consideration is required to support modification of a contract which has not been fully performed. *Everlite Manufacturing Company v. Grand Valley Machine & Tool Company*, 44 Wis. 2d 404, 408, 171 N.W.2d 188 (1969).

Second, the modified contract does not require that Mr. Kmiec handle the matter through the appeal in order to recover the $20,000. Such an intent is not found in the modified contract drafted by Robin Zahran himself. Nor is such a condition reasonably implied in anything relating to

the agreement, including the facts surrounding Robin Zahran's preparation of the modified contract.

## X.

## PROPRIETY OF SANCTIONS.

The Zahrans petitioned this Court contending that the court of appeals has sanctioned them improperly, and, apparently, for some improper reasons such as "revenge" or some other improper motive. We did not participate in the structuring of the sanctions, but based upon what we have seen, the sanctions seem very appropriate.

## CONCLUSION

The Zahrans have failed to present any cogent reasons for this Court to issue a writ of certiorari. We respectfully submit that the Petition should be denied.

Respectfully submitted,

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(3)

No. 99-1042

In the
**SUPREME COURT of the UNITED STATES**

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Robin and Karen Zahran

*Petitioners,*

v.

GERALD G. SHCMIDT, JR. individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,

*Respondents.*

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*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

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# REPLY TO BRIEF IN OPPOSITION

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Jurisdiction in the district court was based on diversity of citizenship under 28 U.S.C. { 1332

The court of appeals had jurisdiction under 28 U.S.C. } 1291 and this Court has jurisdiction under U.S.C. { 1254.

## PETITIONERS REPLY TO KMIEC'S RESPONSE

The Petitioners find it necessary to reply to Kmiec's response due to misrepresentations made in his response. .

### Reply to Kmiec's Statement of the Case

Kmiec's response brief is no more than an attempt to mislead the Court. Zahrans will reply with specific facts supported by the record.

In the original case, Frankenmuth's affirmative defenses and counterclaim plead general allegation of misrepresentations made by Zahrans in their damage claim after declaring they had paid all damages in full. (App. p. 7-22) The jury, through the special verdict, did not declare Zahrans misrepresented their loss in their sworn proof of loss as Kmiec states. In fact, no one knows what the jury's basis of misrepresentations were. (App. p. 23-26)

Kmiec alleges that Zahrans' petition is full of misstatements but fails to point to any specific misstatement in support of his contentions with the exception of pointing to the jury trial demand in which he misrepresents the facts. A jury trial in this case was set for January 13, 1997 at 9:30 a.m. through the magistrate judge minute order dated May 28, 1996 as appears in District Court docket No. 60. (App.p. 1-6 )

Kmiec and his retained damage experts in the original case estimated the damages sustained by Zahrans' farm and introduced evidence at the trial for losses in an amount in excess

of $634,834.92 (App. p. 27-30) These amounts are far in excess of what Zahran's claimed through correspondence and proofs of loss submitted to Frankenmuth relying on experts, contractors and Frankenmuth's own adjusters.

Kmiec should not have taken Zahran's case had he thought it is meritless upon completing his investigation, and should have advised Zahrans accordingly. Nor should he have introduced evidence at trial for damages far in excess of what Zahrans' claimed in their proofs of loss to Frankenmuth before Kmiec was retained and then blame Zahrans for his actions to escape responsibility for damages caused by his negligence.

Kmiec was informed of every dispute Zahrans had before he was retained for representation. Divorce, separation, tax filing, Robin's Zahran's education were never an issue or a part of the evidence in the original action, nor are theses issues relevant or material to the malpractice case, nor were they part of the pleadings or evidence in the original case. Karen endorsed one check and made it payable to the Denmark State Bank ( the loss payee), in the amount of $4,000 and endorsed no others contrary to Kmiec's statement.

Kossuth and American Family Insurance Company coverage's were not an issue in the original case. Kmiec's statement is misleading as to the prior claims in that there was no coverage for acts of vandalism by Kossuth and accordingly, it did not consider these losses as covered claims under the policy provisions, nor paid them. Nor was the issue of misrepresentation on the application for insurance in the American Family an issue in the Frankenmuth case, nor is Kmiec's statement that Zahrans' expert acknowledged that Frankenmuth pleadings, referencing misrepresentations by Zahrans, arose out of the proofs of loss submitted for the tornado loss and not the fire is true.

Zahrans' second proof of loss was made upon the assessment made by Morton Builders Corp. (retained as experts

by Zahrans and later by Kmiec) in which it was discovered at a later date that the same expert was hired secretly by Frankenmuth of whom they paid him to be their consultant at the time he was acting as Zahran's expert at the tornado trial and in fact rendered testimony at the original trial in which he contradicted his prior deposition testimony. (App. p.76-77)

Attorney Richter (Kemic's expert) testified that Frankenmuth's policy was ambiguous and therefore Wisconsin Law will interpret the policy to the benefit of the policy holder, not the insurer. Richter testified that Kmiec's failure to raise that issue could be construed as malpractice and negligence. Further, Richter misstated Wisconsin law because Frankenmuth policy does not allow the voidance of policy absence the specific condition of reliance on the insured's misrepresentation as declared in the *Templis* case. *Templis and Walker cases* (cited by Kmiec) did not contain the element of reliance on the insureds misrepresentations in the policy conditions necessary to void the policy.

Frankenmuth's policy, as demonstrated, did require reliance to void the policy. Additionally, Wisconsin Supreme Court overruled the Appeal Court *Templis* decision declaring that no whole voidance of policies is allowed in Wisconsin as it is inequitable and only allowed the voiding of the items misrepresented. Kmiec himself brought that contention to the attention of the court in the original trail but only after the jury was deliberating which was too late as found by Judge Curran. (App. p. 68)

Zahrans have many business interests. A dispute with a bank or filing of a collection action which resulted in settlement did effect Zahran's credit negatively as would a judgement or a finding of misrepresentation, although they don't have to be exclusive. Kmiec's attempts at diversion of the issues should be discarded.

One must wonder if Zahrans, as Kmiec states, have a habit of bringing frivolous and unfounded claims. Why in the world did these attorneys take Zahrans money, quoted them the law, encouraged them to go to court to seek redress, causing them to pay the expense of litigation, and then claim that Zahrans' claims were baseless upon their failure to carry out their duties upon their specific representations.

As to Zahran's education, Kmiec's introduction of irrelevant material, misquoted deposition statement that Zahran never had a chance to inspect, read , or correct after 13 years shows Kmiec grasping for excuses to escape liability even to the extent of using misquoted statements which was not a part of the issues or evidence in the tornado trail.

As to Kmiec's jury trial statement, Zahrans did not waive their jury trial demand and in fact they demanded it upon their motion to consolidate Case No. 95-C-334 and Case No. 90-C-1281 on 3/11/96,(App.p.74-75) as appears on the District Court's docket statement. (App. p.1) Judge Callaghan, in his minute order, granted Zahrans a jury trail to be held at 9:30 on 1/13/97, as appears on the docket No. 60. (App. p. 1). Kmiec's attempts to mislead this court by stating a jury demand was never demanded or granted before Judge Clevert took the case inspite of knowing otherwise as the docket shows should subject him to sanctions.

The courts below did not address the record the arguments in Zahrans' appeal briefs nor properly considered the earlier courts decisions. Kmiec is defending Cohen's actions knowing he misrepresented the facts of filing papers to the Appeal Court, the Supreme Court and his clients and failed to raise important issues on appeal. Kmiec himself argues that Cohen, in behalf of Zahrans, waived certain arguments on appeal.

**Petitioners Reply to Kmiec's Summary of Argument**

Zahrans, in their petition, showed and demonstrated enough compelling reasons to justify the granting of Zahrans petition. Zahrans' expert was a licensed attorney in the State of Illinois and admitted to the Federal Bar, the Seventh circuit and the U.S. Supreme Court and occasionally tried cases in Wisconsin mainly in the areas of malpractice. If he was unworthy of belief, he shouldn't get away with erroneous unbelievable testimony under oath, nor should he be allowed to practice law in these forums as an officer of the court.

But, the fact is Attorney Gooch's testimony was on point and un-contradicted. In fact it is supported by the record and the original U.S. District Court and the original Appeal Court panel findings. See Frankenmuth's opening arguments (App. p. 31-45) and Kmiec's tardy objections through the motion after verdict (App. p 87-108) in which he raised defenses too late. See Frankenmuth's pre-trial motion (App. p. 78-86). Kmiec's own motion after verdict in the original trial argued to the District Judge everything the appeal court found to have been waived. Simply, Kmiec waived Zahrans' entire defenses as testified by expert Gooch.

Zahrans' petition adequately demonstrated and showed the conflicts of the lower courts' decisions with this court's decisions and with those of Wisconsin Supreme Court and other circuits besides Constitutional infractions on Zahrans' rights by the lower courts enough to justify granting their petition.

Kmiec failed to point out how did Wisconsin law applies to Kmiec's understanding of the law when in fact he cites *Templis* which is inapplicable in this case because the *Templis* policy contract language allows for voiding coverage for misrepresentation in a proof of loss absence reliance. *Templis* policy language however is totally different than that of Frankenmuth policy language which specifically states that to

void Frankenmuth policy, based on misrepresentations, Frankenmuth must prove that it relied on Zahrans' misrepresentations in the adjustment of the claim, a fact Frankenmuth did not prove as found by all the courts below and admitted by Kmiec himself and all the experts.

Kmiec fails to recognize that Karen Zahran's second amended complaint was allowed to be filed of which the defendants responded. Accordingly, even if a jury trial was not demanded or set earlier (which is not the case), a jury demand was therefore timely made pursuant to the different circuits case law and this court decision and opinions as cited in Zahrans' main Petition.

**Petitioners Reply to Kmiec's Reliance Argument**

Kmiec's argument that reliance is not an element necessary to establish misrepresentation is erroneous as a matter of law in this case for the following reasons. It may in itself proves his negligence because he failed to act based on his erroneous understanding of the policy contract and the law, although Kmiec's current position is opposite his position declared to Judge Curran after the jury retired and in his motion after verdict. (App. p. 68 and 87-108)

First, the policy language contract at issue between Zahrans and Frankenmuth made the reliance by Frankenmuth on misrepresentation by the insured in the adjustment of the claim, including misrepresentations in the proof of loss, a necessary element to void the policy. The *Templis* case, policy language quoted by Kmiec did not, Templis court of appeal went further and stated that the policy could be voided only if the policy language allows for such result. Frankenmuth policy did not allow voidance absence reliance by Frankenmuth on the alleged misrepresentations.

Second, Frankenmuth plead as an element of their defenses and counterclaim that they relied on the alleged

misrepresentations, a fact alleged by Frankenmuth as an element of their defense and counterclaim which needed to be proved at trial. There pleadings and allegations were proved to be untrue at the trial evidenced by the district and the appeal court findings in the original case and orders.

Third, The Wisconsin Supreme Court declared in the *Templis* case that Wisconsin will no longer allow voidance of an entire policy upon finding misrepresentations in the presentations of the claim. Instead it will only allow voidance of those items misrepresented during the adjustment of the claim. The defendants did not raise these defences at the original trial and in fact waived them as demonstrated and found earlier by the original courts.

Kmiec, at page 20, finally admits that Zahrans policy contained reliance as an element necessary to void the policy but falsely misrepresents to this court that *Templis* policy is virtually identical to Zahrans policy, when in fact he knows it is not. As to Kmiec's assertion that reliance on Zahrans misrepresentation was not an issue. Reliance was an element plead throughout by Frankenmuth as an element of the counterclaim as shown. Nor does Kmiec dispute Wisconsin Statute 631.11. (1) (b) (l).

Fourth, Frankenmuth never acted on its policy avoidance declaration. It kept Zahrans' policy in force, took more of Zahrans' premium, kept the old premium, and never refunded Zahrans' premium when it declared the policy void even after it achieved judgement against Zahrans for the refund of the monies paid to the mortgagees. Kmiec waived all these arguments.

**Petitioners Reply Referencing the Improper Assignment of Judges in the Courts Below**

All of the U.S. District Court Judges for the Eastern District of Wisconsin (Curran, Stadmuller, Randa, Reynolds) recused themselves. Judge Warren was ill, the case went to

Judge Clevert without random assignment as is required by law. All issued orders similar to Judge Curran recusing himself pursuant to 28U.S.C. 455 (b) (1). Judge Clevert should have done the same.

The lower courts in this case failed to address the issues raised by Zahrans in their arguments by accusing the expert witness of giving unbelievable testimony under oath in a Federal Court without pointing to the specifics of where that expert testimony was mistaken, untruthful, or erroneous.

Kmiec admits that Judge Clevert was loud and mad with Karen Zahrans attorney. The Seventh Circuit recently remanded a case in 1998 on that basis alone where Judge Clevert was the presiding judge when he temporarily lost his temper and was out of control. Kmiec's defense such unwarranted behavior and justify it by explaining that Judge Clevert was mad because Attorney Bickley was objecting on issues that did not involve his client. But the record is clear, there were more objections by the defendants' attorneys on issues that did not involve their own clients. Judge Clevert seemed to have been receptive and did not get mad or upset upon raising objections in behalf of other than their clients. He sustained almost all their objections.

The trial was lengthy not because of Zahrans. It was made lengthy only to accommodate the defendants and their attorneys travel and personal vacation schedules presented during trial as the record will show, causing the trial to be interrupted and spanned over four months. Judge Clevert granted Kmiec's motion to set the mode of the trail giving them wide latitude on how to conduct the trial and what evidence to introduce, yet denied such opportunity to Zahrans.

**Petitioners' Reply to Kmiec's Response and Argument Referencing the Improperly Admitted Evidence**

Immediately before the trial Kmiec moved the court to bar Zahrans from introducing evidence related to the original case. The court precluded Zahrans from calling witnesses to

show that Kmiec failed to carry proper cross examination on the issues relevant to proving Zahrans case and defenses, in effect curtailing Zahrans from carrying proofs based on the case within a case proof used in malpractice actions pursuant to Wisconsin and Federal Law. It is clear the best evidence in malpractice cases is the evidence of what happened in the original case.

Judge Clevert allowed the introduction of immaterial, irrelevant, and inaccurate misquoted deposition transcripts that had no relationship to the allegations, pleadings, disputes or the complaint into evidence. More importantly, all of the issues regarding the disputes between Zahrans on one hand and Old Kent Bank, Buchinger, Providence Washington, James Presentine, Fitzimmons, American Family are distorted and misstated by Kmiec. They were not part of the original case evidence or trial. In fact, admitting them was in violation of F.R.C.P., in particular Rule 402, which served no purpose but extended the trial. On the other hand, Zahrans were precluded from introducing evidence such as sanctions levied against Kmiec for frivolous pleadings in the Federal Courts

The court did not allow expert testimony that was testified to through Attorney Gooch's deposition testimony, but allowed the defendants experts to testify based on speculation or outright misrepresentation of Wisconsin Law even if it was not in their report. The defendants' experts did not read the *Templis* nor the *Walker* policy language to compare it to Frankenmuth policy language to render an opinion, yet they were still allowed to render expert testimony based on these cases purely on speculation.

As to the conspiracy issues, Defendant, Burrell admitted in his deposition and answers to interrogatories that there was a conspiracy between Frankenmuth adjusters to deprive Zahrans of their policy proceeds. Burrell and Kmiec, in lieu of Frankenmuth's allegations of misrepresentation against Zahrans

along with the fire occurrences, had the duty to pursue discovery on these issues and not leave to chance or speculation Zahrans' defenses and proofs as both the fire and tornado litigations were inseparable pursuant to Burrell's opinion. The defendants owed Zahrans a duty to know in order to be able to defend and advise and properly represent their clients. Instead, they were negligent and careless.

## CONCLUSION

In summary, granting the petition would put clarity on many issues relating to attorneys and clients relationships as to duties, responsibilities, promises, contracts, legal malpractice expert testimony and the duty of care by attorneys and would give much needed guidance in that particular area of the law, especially where attorney's negligence is becoming so common and in some instances, causing great injustices.

Zahrans demonstrated the impropriety of the lower courts decisions and orders supported by the facts and set forth many reasons for this court to interfere and to set standards for attorney's legal conduct, free of special considerations. This case raises many of the issues that needs guidance and precedent to be set by the Court which would be beneficial in all malpractice cases, insurance contracts, and the enforcement's of their provisions in diversity actions, doctrines of estoppel, waiver, and the assignment of cases in the district and appeal courts along with questions referencing the Constitutional guarantees of equal application of the law and the rights to a jury trial.

Respectfully submitted,

Robin Zahran

Karen Zahran

U.S. District Court
Eastern District of Wisconsin (Milwaukee)

CIVIL DOCKET FOR CASE # : 95-CV-334

Zahran, et al v. Schmidt, et al
Filed: 03/31/95
Assigned to: Judge Charles N. Clevert
Demand: $0,000 Nature of Suit: 190
Lead Docket: None Jurisdiction: Federal Question
Dkt # in USCA Zahran 4/28/98: is : 98-02123
Dkt # in USCA: is a : 97-03710
Cause : 28:1331 Federal Question: Other Civil Rights

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| 3/11/96 | 47 | MOTION by plaintiff Robin Zahran, plaintiff Karen Zahran to consolidate cases 95-C-334 and 95-C-1281 (bet) [Entry date 03/12/96] |
| 3/11/96 | 48 | CERTIFICATE OF SERVICE by plaintiff Robin Zahran, plaintiff Karen Zahran (bet) [Entry date 03/12/96] |
| 3/29/96 | 49 | BRIEF by defendant Gerald G. Schmidt Jr, defendant Robert C. Burrell, defendant Marian R. Kmiec, defendant Christopher A. McConville, defendant ABC Ins. Co., defendant Schmidt & Darling, defendant Borgelt Powell Peter |

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| | | in opposition to motion to consolidate cases 95-C-334 and 95-C-1281 [47-1] (eeb) |
| 4/1/96 | 50 | BRIEF by defendant Robert C Burrell, defendant Borgelt Powell Peter in opposition to motion to consolidate cases 95-C-334 and 95-C-1281 [47-1] (eeb) |
| 4/1/96 | 51 | BRIEF by defendant Gerald G Schmidt Jr. defendant Schmidt & Darling in opposition to motion to consolidate cases 95-C-33 and 95-C-1281 [47-1] (eeb) |
| 4/2/96 | 52 | BRIEF by defendant Marion R Kmiec in opposition to motion to consolidate cases 95-C-334 and 95-C-1281 [47-1] (eeb) [Entry date 04/03/96] |
| 5/28/96 | 60 | HEARING MINUTES: ; discovery ddl set for 12/1/96; motion filing ddl set for 12/15/96; jury trial set for 9:30 a.m. on 1/13/97; plaintiff shall disclose expert witnesses by 7/1/96; defendants shall disclose expert witnesses by 10/1/96; plaintiff shall have until 6.6.96 to file letter indicating intent to withdraw count 6 of 1st amended complaint as well as their motion to consolidate; plaintiffs shall have until 6/11/96 to file the following motions: (1) for leave to personally serve def. McConville within 30 days; (2) for leave to file 2nd amended complaint; defendants shall |

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| | | have until 6/21/96 to file a response to plaintiffs motions; plaintiff shall have until 6/29/96 to file a reply, if they choose to do so. (eeb) [Entry date 05/30/96] |
| 5/9/97 | 234 | NOTICE OF MOTION & MOTION by plaintiff Karen Zahran by Atty John Bickley, Jr. FOR ORDER TO ADOPT ON BEHALF OF KAREN ZAHRAN COUTS 1 THROUGH COURT V OF THE THIRD AMENDED COMPLAINT DATED 2/4/97 & TO ADOPT THE RESPONSE TO MOTION FOR SUMMARY JUDGMENT & ALL OTHER DOCUMENTS & PLEADINGS EXECUTED BY ASSOCIATE EFIC M. SDRENKA (ers) |
| 5/19/97 | 236 | THIRD AMENDED COMPLAINT by Plaintiff Karen Zahran, Jury Demand (ers) |
| 5/22/97 | 241 | MOTION by plaintiff Karen Zahran FOR TRIAL BY JURY (kmf) |
| 5/22/97 | 242 | AFFIDAVIT of John Bickley, Jr. re {241-1} (kmf) |
| 5/22/97 | 243 | NOTICE OF MOTION & MOTION by defendant Robert C. Burrell, defendant Borgelt Powell Peter, third-party |

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| | | defendant Reliance Ins. Co FOR SUMMARY JUGMENT (kmf) |
| 5/22/97 | 244 | BRIEF by defendant Robert C Burrell, defendant Borgelt Powell Peter, third-party defendant Reliance Ins. Co IN SUPPORT of motion FOR SUMMARY JUDGMENT {243-1} (kmf) |
| 5/23/97 | 250 | AFFIDAVIT of Christine Nelson w/ attachments (ers) |
| 5/23/97 | 251 | ORDER by Judge Charles N. Clevert DENYING motion FOR EXTENSION OF THE 5/2/97 DISCOVERY CUT-OFF DATE, CONTINUATION OF 6/2/97 TRIAL DATE & EXTENSION OF TIME FOR FILING EXPERT WITNESS REPORTS TO REBUT OR OTHERWISE CONTRADICT DEFTS EXPERT WITNESS REPORT REGARDING DAMAGES {219-1}, DENYING W/O MERIT motion TO STRIKE DEFTS KMIEC, KMIEC LAW OFFICES & WIS. LAYERS MUTUAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT & RELATED PLEADINGS {193-1}, GRANTING motion for order regarding plaintiffs expert on damages. {184-1}, GRANTING motion for extension of time for filing experts reports {182-1}, DENYING AS MOOT motion to strike {160-1}, GRANTING motion for order |

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| | | to nonsuit count VI of Karen Zahran's amended complaint. {159-1}, DENYING motion to dismiss plaintiffs amended complaint. {193-1}, GRANTING motion to dismiss {138-1}, GRANTING motion to strike VI {138-2} DENYING motion to dismiss {137-1}, DENYING motion to strike plaintiffs amended complaint. {137-2} The matter is schedued for trial to the Court 6/30/97 at a time to be scheduled by the Court. (cc: all counsel) (ers) {Entry date 05/27/97} |
| 5/30/97 | 264 | ORDER by Judge Charles N. Clevert GRANTING motion TO STRIKE KAREN ZAHRAN'S THIRD AMENDED COMPLAINT & JURY DEMAND. {258-1} GRANTING motion TO STRIKE {248-1} GRANTING IN PART & DENYING IN PART motion TO DISMISS KAREN ZAHRAN'S THIRD AMENDED COMPLAINT OR, IN ALTERNATIVE, RESPONSE TO KAREN ZAHRAN'S MOTION TO FILE THIRD AMENDED COMPLAINT FOR SANCTIONS {248-1}, DENYING motion FOR TRIAL BY JURY {241-1}, GRANTING motion TO STRIKE THIRD AMENDED COMPLAINT OF KAREN ZAHRAN & JURY TRIAL DEMAND OF KAREN ZAHRAN {245-1} The Third Amended Complaint of Karen Zahran attached to |

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| | | the Affidavit of John Bickley, Jr. is STRICKEN (cc. all counsel) (ers) {entry date 06/03/97} |
| 6/20/97 | 284 | SUPPLEMENTAL RESPONSE by defendant Marian R Kmiec to Robin Zahran's Request for Production of Documents (ers) |
| 6/26/97 | 300 | SECOND SUPPLEMENTAL RESPONSE to Robin Zarhan's Reguest for Production of Documents by defendant Marian R Kmiec w/ attachments (ers) |
| 6/26/97 | 301 | BRIEF by plaintiff KAREN ZAHRAN IN OPPOSITION to Kmiec, Kmiec Law Offices & Wisconsin Lawyers Mutual Insurance Co's motion FOR ORDER RE: MODE & METHOD OF TRIAL PRESENTATION {270-1} (ers) |
| 6/26/97 | 302 | BRIEF by plaintiff ROBIN ZAHRAN IN OPPOSITION to Deft Kmiec, Kmiec Law Office & Wisconsin Lawyers Mutual Insurance Co.,'s motion FOR ORDER RE: MODE & METHOD OF TRIAL PRESENTATION {270-1} (ers) |

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

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|---|---|
| ROBIN ZAHRAN and KAREN ZAHRAN, | ) |
| Plaintiffs, | ) |
| v. | )No. 90 C 0337 |
| FRANKENMUTH MUTUAL INSURANCE COMPANY, | )Judge: )Thomas J.Curran |
| Defendants. | ) |

DEFENDANT'S FIRST AMENDED ANSWER AND AFFIRMATIVE DEFESNES

NOW COMES, the Defendant, FRANKENMUTH MUTUTAL INSURANCE COMPANY (hereinafter "FRANKENMUTH"), by its attorneys, JAMES M. HOEY, MARGARET M. HUPP and CLAUSEN MILLER GORMAN CAFFREY & WITOUS, P.C., and for its First Amended Answer and Affirmative Defenses to Plaintiff's Complaint states as follows:

JURISTICTION AND VENUE

1. The jurisdiction of this Court is based upon the diverse citizenship of the parties (28 U.S.C. § 1332). The Plaintiffs are citizens of the State of Illinois and the Defendant is a corporation incorporated under the laws of the State of Michigan, with its principal place of business in the State of

Michigan. The matter in controversy exceeds the sum of $50,000, exclusive of interest and costs.

ANSWER: Defendant admits the allegations of Paragraph 1.

2. The Plaintiffs reside in the Northern District of Illinois, United States District Court.

ANSWER: Defendant admits the allegations of Paragraph 2.

GENERAL ALLEGATIONS

3. On or about august 5, 1988, in consideration of premiums paid to it by the Plaintiffs, the Defendant, an insurance company, made, executed the delivered to the Plaintiffs at Denmark, Wisconsin, a policy of insurance, No. FR 0423155. The policy, which was effective as of July 19, 1988, insured certain farm buildings and other property owned by the Plaintiffs. A copy of the policy with declarations is attached hereto as Exhibit A and made a part hereof.

ANSWER: Defendant admits that it issued a farm owners policy to ROBIN or KAREN ZAHRAN with Policy No. FR 0423155 effective from 7/19/88 to 7/19/89, and Defendant states that said policy was issued and in force only subject to all of its terms, conditions, limitations and exclusions, and not otherwise. Defendant denies the remaining allegations of Paragraph 3.

4. On or about May 24, 1989, while the policy was in full force and effect, a tornado and high winds damaged and destroyed certain of the Plaintiff's property insured by the policy, as follows:

a. Farm personal property (Unit 102), insured for an amount up to $380,000, was damaged in excess of $133,000.

b. A two-story barn (Unit 151), insured for an amount up to $75,000, was damaged in excess of $75,000.

c. Barn #2 (Unit 152), insured for an amount up to $100,000, was damaged in excess of $100,000.

d. Barn #3 (Unit 153), insured for an amount up to $100,000 was damaged to the extent of $65,000.

e. A milk house and bulk tank (Unit 154), insured for an amount up to $25,000, were damaged in excess of $25,000.

f. Silo #1 (Unit 156), insured for an amount up to $20,000, was damaged to the extent of $5,351.66.

g. Silo #2 (Unit 157), insured for an amount up to $20,000 was damaged to the extent of $5,351.66.

h. Silo #3 (Unit 158), insured for an amount up to $25,000, was damaged to the extent of $5,351.66.

i. A slurry store (Unit 160), insured for an amount up to $40,000, was damaged in excess of $40,000.

ANSWER: Defendant admits that on or about May 24, 1989, while the policy was in full force and effect, a windstorm damaged certain and limited of Plaintiff's property insured by the policy. Defendant states that it has paid Plaintiffs for certain property damaged in the windstorm. Defendant is not liable to Plaintiffs for any further sums.

a. Defendant admits that Unit 102 blanket farm personal property contains a limit of $380,000 under the policy, but Defendant denies that farm personal property (Unit 102) was damaged

in excess of $133,000 as a result of the windstorm loss. Defendant has paid Plaintiffs the sum of $26,609.99 which sum represents Plaintiff's total personal property loss.

b. Defendant admits that a two-story barn (Unit 151) was insured under the policy with a limit of $75,000 as a result of the windstorm loss, but Defendant denies that Unit 151 was damaged in excess of $75,000 and Defendant states that it has paid Plaintiffs the sum of $22,223.40 in full payment of damage to Unit 151.

c. Defendant admits that Barn #2 (Unit 152) was insured under the policy with a limit of $100,000 as a result of the windstorm loss, but Defendant denies that said Unit 152 was damaged in excess of $100,000 and Defendant states that is has paid Plaintiffs the sum of $4,000 in full payment of any alleged damages to Unit 152.

d. Defendant admits that Barn #3 (Unit 153) was insured under the policy with a limit of $100,000, and Defendant states that it has paid Plaintiffs the sum of $100,000 for damage to this barn, which represents the limit of liability for this barn under the policy.

e. Defendant admits that a milk house and bulk tank (Unit 154) was insured under the policy with a limit of $25,000, but Defendant states that said milk house and bulk tank were not damaged as a result of the windstorm on May 24, 1989, and Defendant denies that said Unit 154 was damaged in excess of $25,000.

f. Defendant admits that Silo #1 (Unit 156) was insured under the policy with a limit of $20,000, and Defendant admits that Silo #1 was damaged

to the extent of $5,351.66, but Defendant states that it has paid Plaintiffs this sum for damage to this silo.

g. Defendant admits that Silo #2 (Unit 157) was insured under the policy with a limit of $20,000, but Defendant states that it has paid Plaintiffs the sum of $5,351.66 for damage to this silo.

h. Defendant admits that Silo #3 (Unit 158) was insured under the policy with a limit of $25,000, but Defendant states that it paid Plaintiffs the sum of $5,351.66 for damage to this silo.

i. Defendant admits that a slurry store (Unit 160) was insured under the policy with a limit of $40,000. Defendant states that it has paid Plaintiffs the sum of $14,000 for alleged damage to the slurry store, and Defendant denies that said Unit 160 was damaged in excess of $40,000.

COUNT I
ALLEGED BREACH OF CONTRTACT

5. The Plaintiffs reallege Paragraphs 1 through 4 above as Paragraphs 1 through 4 of Count I.

ANSWER: The Defendant realleges its answers to Paragraphs 1 through 4 above as its answer to Paragraphs 5 of count I.

6. On or about May 26, 1989, the Plaintiffs notified the Defendant of the loss and submitted a proof of loss to the Defendant on July 25, 1989, with subsequent amendments.

ANSWER: Defendant admits the allegations of Paragraph 6.

7. The Plaintiffs demanded payment of the amounts due on the policy, but the Defendant has failed and refused to pay said amounts, except the sum of $181,912.74, leaving a

balance in excess of $272,142.24 due to the Plaintiffs under the policy.

ANSWER: Defendant states that it has paid Plaintiffs the sum of $182,888.37. Defendant states that it is not liable to Plaintiffs for any further sum or sums whatsoever, and Defendant denies the remaining allegations of Paragraph 7.

8. The Plaintiffs have performed all conditions precedent of the policy on their part to be performed.

ANSWER: Defendant denies the allegations of Paragraph 8.

9. The Defendant breached the conditions of the policy in that it failed and refused to pay fully the Plaintiff's claims, despite repeated demands by the Plaintiffs to do so.

ANSWER: Defendant admits that it has refused to pay the total amounts claimed by the Plaintiffs, but Defendant denies that it breached the conditions of the policy, and Defendant denies that it is indebted to Plaintiffs in any further sum or sums whatsoever.

10. Because of the Defendant's breach of contract and its failure to pay the Plaintiff's claims, the Plaintiffs have suffered consequential and proximate damages in excess of $265,000 described in part as follows:

a. Certain equipment and fixtures owned by the Plaintiffs were left open to water and weather damage as a result of the Plaintiff's inability to cover or replace their two-story barn, causing the equipment and fixtures to be corroded and damaged in excess of $55,000 for repair and replacement.

b. The Plaintiffs lost space and facilities for more than 80 cows, resulting in annual lost milking profits in excess of $210,000.

c. Plaintiff ROBIN ZAHRAN lost time and profits from his insurance business in attempting to persuade the Defendant to settle the Plaintiff's claims fairly and promptly.

ANSWER: Defendant denies each and every allegation of Paragraph 10, including subparagraphs 10a through 10c, inclusive. Defendant states that Plaintiffs may not recover alleged consequential damages for alleged breach of contract as a matter of law.

11. There is now due and owing to the Plaintiffs from the Defendant an amount in excess of $272,142.244 due under the policy plus an amount in excess of $265,000 due as consequential and proximate damages for a total amount in excess of $537,000, plus interest, attorneys' fees and costs of this action.

ANSWER: Defendant denies each and every allegation of Paragraph 11.

WHEREFORE, Defendant, FRANKENMUTH MUTUAL INSURANCE COMPANY prays that judgment be entered in its favor and against Plaintiffs, and that it be awarded its costs and attorneys' fees sustained herein.

## COUNT II
## ALLEGED BREACH OF GOOD FAITH

12. The Plaintiffs reallege Paragraphs 1 through 11 above as Paragraph 1 through 11 of Count II.

ANSWER: Defendant realleges its answers to Paragraphs 1 through 11 above as its answer to Paragraphs 12 of Count II.

13. In acting as an insurance company, the Defendant impliedly represented that it would act fairly and promptly for its insured.

ANSWER: Defendant admits the allegations of Paragraph 13 and further states that it did, in fact, act fairly and promptly for its insured.

14. The Defendant has in implied-in-law duty of good faith and fair dealing toward its insured.

ANSWER: Defendant admits the allegations of Paragraph 14 and further states that it did act with good faith and fair dealing toward its insured.

15. The Defendant breached the policy's implied conditions of good faith and engaged in improper claims practices, despite repeated demands by the Plaintiffs, as follows:

a. The Defendant failed to pay the Plaintiff's claims fairly and promptly.

b. The Defendant withheld payments due to the Plaintiffs on their claims.

c. The Defendant delayed making payments to the Plaintiffs on their claims.

d. The Defendant failed to make adequate investigation of the Plaintiffs claims.

e. The Defendant failed to make adequate investigation of the Plaintiffs' claims.

f. The Defendant fraudulently attempted to dispose of the Plaintiffs' claims by submitting to them a check in the amount of $14,000 stating "in total satisfaction of all claims."

g. The Defendant demonstrated racial and cultural bias toward the Plaintiffs in connection with its failure to pay the Plaintiffs' claims.

ANSWER: Defendant denies each and every allegation of Paragraph 15, including subparagraphs 15a through 15g, inclusive.

16. The Defendant intentionally denied the Plaintiffs' claims without a reasonable basis.

ANSWER: Defendant denies the allegations of Paragraph 16.

17. The Defendant failed to pay the Plaintiffs' claims wilfully and wantonly. Punitive damages are therefore justified in this case.

ANSWER: Defendant denies the allegations of Paragraph 17, and further states that Plaintiffs may not recover punitive damages as a matter of law.

18. As a direct and proximate result of the Defendant's breach of good faith, the Plaintiffs have been damaged in excess of $537,000, plus interest, attorneys' fees and costs of this action.

ANSWER: Defendant denies that it breached any duty of good faith, and Defendant denies each and every remaining allegation of Paragraph 18.

WHEREFORE, Defendant FRANKENMUTH MUTUTAL INSURANCE COMPANY prays that judgment be entered in its favor and against Plaintiffs, and that it be awarded its costs and attorneys' fees sustained herein.

## COUNT III
## ALLEGED BREACH OF STATUTE

19. The Plaintiffs reallege Paragraphs 1 through 18 above as Paragraphs 1 through 18 of Count III.

ANSWER: Defendant realleges its answers to Paragraphs 1 through 18 above as its answer to Paragraphs 19 of Count III.

20. The Defendant's actions, delay and refusal to pay the amount of the loss payable under the policy are vexatious and unreasonable under the provisions of Illinois Revised Statutes Chapter 73, Paragraph 767, thereby rendering the Defendant liable to the Plaintiffs under that paragraph.

ANSWER: Defendant admits the existence of Illinois Revised Statute 73, Paragraph 767, but denies that said statute applies to the present case, and further denies Defendant in any way violated that statute. Defendant denies the remaining allegations of Paragraph 20.

21. There is now due and owing to the Plaintiffs from the Defendant an amount in excess of $537,000, plus interest, attorneys' fees and costs of this action.

ANSWER: Defendant denies the allegations of Paragraph 21.

WHEREFORE, Defendant FRANKENMUTH MUTUAL INSURANCE COMPANY prays that judgment be entered in its favor and against Plaintiffs, and that Plaintiffs' claim for interest, attorneys' fees, costs or any other monetary awards be denied, and that Defendant be awarded its costs and attorneys' fees sustained herein.

FIRST AFFIRMATIVE DEFENSE

For its First Affirmative Defense, FRANKENMUTH states:

1. The policy sued upon Plaintiffs in part states as follows:

> NEGLECT -- We do not pay for loss which results from the neglect of an insured to use all reasonable means to save and preserve covered property at and after the time of loss.

2. Plaintiffs' claim for certain equipment and fixtures which were left open to water and weather damage which Plaintiffs allege caused the equipment and fixtures to be corroded is not covered by reason of the Neglect Provision of the Policy.

SECOND AFFIRMATIVE DEFENSE

For its Second Affirmative Defense FRANKENMUTH states:

3. The policy with respect to "What you must do in case of loss" states as follows:

The insured must also:

(1) Take all reasonable steps to protect covered property at and after an insured loss to avoid further damage; . . .

4. Plaintiffs' claim for certain equipment and fixtures which were left open to water and weather damage causing the equipment and fixtures to be corroded and damaged is not covered by the policy by reason of the policy provision mentioned above.

THIRD AFFIRMATIVE DEFENSE

For its Third Affirmative Defense, FRANKENMUTH states:

5. The policy sued upon further provides as follows:

MISREPRESENTATION, CONCEALMENT OR FRAUD--This entire policy is void if, whether before or after a loss;

a. an insured has willfully concealed or misrepresented:
   (1) any material fact or circumstances concerning this insurance; or
   (2) an insured's interest herein.
b. there has been fraud or false swearing by an insured regarding any matter relating to this insurance or the subject thereof.

No misrepresentation or breach of affirmative warranty affects our obligations under the policy unless:

1. We rely on it and it is material or its is made with intent to deceive; or

2. The fact misrepresented or it is made with intent to deceive; or

6. The Plaintiffs executed and submitted to Defendant a Sworn Statement in Proof of Loss on or about July 25, 1989. In said Sworn Statement and Proof of Loss Plaintiffs stated that at the time of the loss the interest of the insured in the property was solely his, and no other person or persons had any interest therein or encumbrance thereon. Plaintiffs made claim for certain property in the amount of $240,300.37

7. Plaintiffs then submitted a document to Defendant dated September 8, 1989, wherein in addition to the Proof of Loss they made claim for an additional $180,564.67.

8. Plaintiffs submitted a document to Defendant dated September 22, 1989, wherein they made claim for an alleged outstanding balance still due of $314,492.00.

9. Based on the foregoing, the Plaintiffs willfully concealed or misrepresented material facts or circumstances concerning this insurance or the insured's interest herein with intent to deceive, Defendant relied on the misrepresentations and the willfully concealed material facts, and there was fraud and false swearing by the insured regarding a matter relating to the insurance or the subject thereof. Accordingly, Defendant is not indebted to Plaintiffs in any sum or sums whatsoever.

## FOURTH AFFIRMATIVE DEFENSE

For its Fourth Affirmative Defense, FRANKENMUTH states as follows:

10. On July 8, 1990, a fire occurred at Plaintiffs' premises which caused damage to Plaintiffs' buildings.

11. Plaintiffs executed and submitted to Defendant a Sworn Statement in Proof of Loss on or abut August 28, 1990.

In said Sworn Statement and Proof of Loss, Plaintiffs claimed an amount in excess of $116,802.50 for the fire damage. As to Barn 151, Plaintiffs made claim for the limit of $75,000.

12. After investigating and adjusting the fire loss, Defendant forwarded a settlement draft to the Plaintiffs in the amount of $99,995 for full payment of the fire damage. Said payment included $75,000 for the limit of coverage for Barn 151.

13. In correspondence dated November 1, 1990, Defendant advised the Plaintiffs of the breakdown of payments made and indicated the limit of coverage for Barn 151 in the amount of $75,000 was paid in full at that time.

14. In this case, prior to the fire loss of July 8, 1990, Plaintiffs claimed Barn 151 was a total loss. Yet, after the fire loss, Plaintiffs made claim for the full limit of liability of Barn 151. Plaintiffs are estopped in this case from claiming that Barn 151 was a total loss following the windstorm.

15. Any damages that may be awarded against FRANKENMUTH (which Defendant denies) must be reduced or diminished by the subsequent payments for the fire loss.

WHEREFORE, Defendant, FRANKENMUTH MUTUAL INSURNACE COMPANY prays that judgment be entered in its favor and against Plaintiffs, and that it be awarded its costs and attorneys' fees sustained herein.

## COUNTERCLAIM

1. Pursuant to the demands of Plaintiffs, Defendant has paid Plaintiffs the sum of $182,888.37 for alleged damage to property as a result of the windstorm of May 24, 1989.

2. The Plaintiffs executed and submitted to Defendant a Sworn Statement in Proof of Loss on or about July 25, 1989. In said Sworn Statement in Proof of Loss Plaintiffs stated that at the time of the loss the interest of the insured and

the property was solely his, and no other person or persons had any interest therein or encumbrance thereon. In said Sworn Statement in Proof of Loss Plaintiffs made claim for certain property in the amount of $240,300.37.

3. Plaintiffs then submitted a document to Defendant dated September 8, 19089, wherein in addition to the Proof of Loss they make claim for an additional $180,564.67.

4. Plaintiffs submitted a document to Defendant dated September 27, 1989, wherein they made claim for an alleged outstanding balance still due of $314,492.00.

5. Plaintiffs have made claim for a ventilation system under the Personal Property Coverage of the policy, even though said property was a fixture and a part of the buildings, and said claim was made with an intent to deceive the Defendant.

6. Plaintiffs have made claim for a two-story barn (Unit 151) for an amount in excess of the policy limit of $75,000, with the intent to deceive the Defendant even though said barn is not a total loss.

7. Plaintiffs have made claim for Barn #2 (Unit 152) for alleged damage in excess of the policy limit of $100,000, with intent to deceive the Defendant even though said barn is not a total loss.

8. Plaintiffs have made claim for a milk house and bulk tank and Plaintiffs claim that said loss is in excess of the policy limit of $25,000, when in fact said milk house and bulk tank were not damaged and are not a total loss, and said claim was made with the intent to deceive Defendant.

9. Plaintiffs have made claim for a slurry store (Unit 160) for an amount in excess of the policy limit of $40,000 when said slurry store was not a total loss. Said claim was relied upon by Defendant and was made with intent to deceive the Defendant.

10. The policy issued by the Defendant to Plaintiffs referred to in Plaintiffs' Complaint states as follows:

MISREPRESENTATION,CONCEALMENT OR FRAUD--This entire policy is void if, whether before or after a loss;

a. an insured has willfully concealed or misrepresented:
   (1) any material fact or circumstances concerning this insurance; or
   (2) an insured's interest herein.

b. there has been fraud or false swearing by an insured regarding any matter relating to this insurance or the subject thereof.

No misrepresentation or breach of affirmative warranty affects our obligations under the policy unless:

11. Plaintiffs willfully concealed or misrepresented material facts or circumstances concerning this insurance or the insured's interest herein with intent to deceive, Defendant relied on the misrepresentations and willfully concealed material facts, and there was fraud and false swearing by the insured regarding a matter relating to the insurance or the subject thereof.

12. Based on Plaintiffs' misrepresentation, concealment or fraud, the policy is void and Plaintiffs are liable to Defendant for the sums previously paid to Plaintiffs by Defendant.

WHREFORE, FRANKENMUTH MUTUTAL INSURANCE COPNAY prays that judgment be entered in its favor and against Plaintiffs in the sum of $182,888.37, plus interest, costs and attorneys' fees.

DEFENDANT AND COUNTER-PLAINTIFF DEMAND TRIAL BY JURY

James M. Hoey

_____

JAMES M. HOEY

JAMES M. HOEY
MARGRGE M. HUPP
CLAUSEN MILLER GORMAN
CAFFREY & WITOUS, P.C.
10 South La Salle Street
Chicago, Illinois 60603-1098
312/855-1010

Attorneys for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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ROBIN ZAHRAN and
KAREN ZAHRAN,
Plaintiffs, Case No. 90-C-337

v.

FRANKENMUTH MUTUAL
INSURANCE COMPANY,
Defendant.

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SPECIAL VERDICT

We the Jury in the above -entitled case, having been duly impaneled and sworn to try the issues, find four our special verdict as follows:

QUESTION NO. 1:

Did the Zahrans violate the policy provision relating to misrepresentation, concealment or fraud by willfully concealing any material fact or circumstance concerning their insurance claim?

Yes XXX No. _____

If the answer to the preceding question was "yes," you need not answer any of the following questions. If the answer was "no," please answer the following question.

QUESTION NO. 2:

Are the plaintiffs, Robin and Karen Zahran, entitled to monies under the insurance policy as a result of the May 24, 1989 windstorm regarding the damage to their farm and/or personal property?

Yes _____ No. _____

QUESTION NO. 3:

If you answered Question No. 2 "yes," then answer this question:

What sum of money will reasonably compensate the plaintiffs, Robin and Karen Zahran, for damage to:

a. Barn (Unit 151) $_____

b. Milk barn (Unit 152) $_____

c. Grainery and milk house (Unit 154) $_____

d. Slurry tank (Unit 160) $_____

e. Farm Personal Property $_____

QUESTION NO. 4:

Did the defendant, Frankenmuth Mutual Insurance Company, at any time, act in bad faith in the handling of Robin and Karen Zahrans' claims resulting from the damage to their farm and/or personal property due to the May 24, 1989 windstorm?

Yes _____ No _____

QUESTION NO. 5:

If you have answered Question No. 4 "Yes," then answer this question.

What sum of money will reasonably compensate Karen and Robin Zahran for:

a. Farm business losses due to delay $_____

b. Losses form plaintiffs' insurance business $_____

QUESTION NO. 6:

What sum of money, if any, should be assessed against the defendant, Frankenmuth Mutual Insurance Company, under the circumstances of this case, as punishment in order to deter the defendant and others from offending in a like manner in the future?

$ _____

We, the jury unanimously find the facts to be as indicated in our answers to the foregoing questions.

Dated this 26 day of December, 1991.

| | |
|---|---|
| Foreperson | Juror |
| Juror | Juror |
| Juror | Juror |
| Juror | |

DEFENDANT'S PROPOSED INSUTRUCTION NO. 37

DEFENDANT'S PROPOSED SPECIAL VERDICT FORM

1. Did the ZAHRANS violate the policy provision relating to misrepresentation, concealment or fraud?

ANSWER: _____
yes or no

If the answer to the preceding question was yes, you need not answer any of the following questions. If the answer was no, please answer the following question.

2. Are the Plaintiffs entitled to recover against FRANKENMUTH on their breach of contract claim?

ANSWER: _____
yes or no

If the answer to the proceeding question was no, you need not answer any of the following questions. If the answer was yes, please answer the following questions.

3. What was the amount of the ZAHRAN's loss covered under the insurance policy as a result of the windstorm of May 24, 1989.

| | | |
|---|---|---|
| 1. | Barn (Unit 12) | $_____ |
| 2. | Milk house and bulk tank (Unit 154) | $_____ |
| 3. | Slurry tank (Unit 160) | $_____ |
| 4. | Farm personal property | $_____ |
| 5. | Debris removal | $_____ |
| | TOTAL | $_____ |

4. Did FRANKENMUTH exercise bad faith in denying the claim of the ZAHRANS?

ANSWER: _____
yes or no

Unit 151 (Main Barn)
Coverage: $75,000.00
Damage: over $75,000.00 (Ex. 30-Zellner)
Amount Paid: $8,500.44 (Ex. 2, p.27)
$6,274,00 (Ex. 2, p. 68)
Amount Unpaid: $60,225.56

Unit 152 (Warming Barn)
Coverage: $100,000.00
Damage: over $139,068.94 (Ex. 2, p.15)
Amount Paid: $4,000.00
Amount Unpaid 96,000.00

Unit 153 (Blown Away)
Coverage: $100,000.00
Damage: over $100,000.00
Amount Paid: $75,000.00
$25,000.00
Amount Unpaid: -0-

Unit 154 (Grain Barn & Milk Tank)
Coverage: $25,000.00
Damage: $25,500.00 (Ex. 30-Zellner)
Amount Paid: -0-
Amount Unpaid: $25,000.00

Unit 156 (Silo)
Coverage: $20,000.00
Damage:
Amount Paid: $5,351.66
Amount Unpaid:

Unit 157 (Silo)
Coverage: $20,000.00

Damage:
Amount Paid: $5,531.66
Amount Unpaid:

Unit 158 (Silo)
Coverage: $25,000.00
Damage:
Amount Paid: $5,531.66
Amount Unpaid:

Unit 159 (Silo)
Coverage: $10,000.00
Damage: Not damaged
Amount Paid:
Amount Unpaid:

Unit 155 (Machine Shed)
Coverage: $16,000.00
Damage: Not damaged seriously
Amount Paid:
Amount Unpaid:

Unit 160 (Slurry Tank)
Coverage: $40,000.00 + Farm Personal Prop. coverage
Damage: $79,070.00 (Ex.33-Wildenberg)
Amount Paid: $14,000.00
Amount Unpaid: $65,.070.00

Unit 102 (Farm Personal Prop.)
Coverage: $380,000.00
Damage:
Amount Paid: $26,609.00 + $6,473.22 for Fan in 151
Amount Unpaid:

Advances to plaintiff: $25,000.00 (Used by Frankenmuth for Barn 153 and is included in Amount Paid column of Unit 153 above.

SUMMARY

Total Unpaid: $506,086.51

| | | |
|---|---|---|
| $ 60,225.56 | - | Unit 151 |
| $ 96,000.00 | - | Unit 152 |
| $ 25,000.00 | - | Unit 154 |
| $ 65,070.00 | - | Unit 160 |
| $183,370.00 | - | Milk Losses |
| $ 76,420.95 | - | Unit 102 Farm Personal Property including: |
| $ 6,364.02 | - | 5 Cows @ $1,600 minus the monies received by vet. |
| $ 3,699.00 | - | Silo Elevator |
| $ 10,000.00 | - | 2 Fans |
| $ 4,200.00 | - | 2 Running Gears |
| $ 209.00 | - | Diesel Tank |
| $ 2,178.00 | - | Gutters |
| $ 797.55 | - | 1 day of lost milk (6,500 lbs @ $12.27 per 100 lbs) |
| $ 398.00 | - | Silo pipe and door |
| $ 4,628.38 | - | Braun Electric |
| $ 32,473.95 | - | Total Farm Personal Property Damage Not Paid For by Frankenmuth |
| $ 40,947.00 | - | Property damage either covered by policy or caused by Frankenmuth's delay. |

| | | |
|---|---|---|
| $ | 3,000.00 - | 2,000 bails of straw @ $1.50 per bail |
| $ | 76,420.95 | -Total |

| | |
|---|---|
| Total Unpaid as above: | $506,086.51 |
| Interest on Unpaid at 12% (12-1-89 to present): | $128,748.81 |
| Total Losses: | $634,834.92 |

12/17/91 JURY TRIAL - OPENING STATEMENT: DEFENDANT

PROCEEDINGS

THE CLERK: Robin and Karen Zahran, plaintiff, versus Frankenmuth Mutual Insurnace Company, defendat, Case Number 90-C-337. This is a jury trail. May we have the appearnaces, please.

MR. KMIEC: Marjan R. Kmiec and Christopher McConville for the plaintiffs, Robin and Karen Zahran, who are also present.

THE COURT: Good morning.

MR. HOEY: Good morning, Your Honor, James Hoey and Peter Kanaris for Frankenmuth.

THE COURT: Good morning. And good morning, members of the jury.

Are you ready to proceed, Mr. Hoey?

MR. HOEY: I am, Your Honor.

OPENING STATEMENT

MR. HOEY: May it please the court.

THE COURT: Counsel

MR. HOEY: Ladies and gentlemen of the jury, Mr. and Mrs. Zahran, Counsel.

As you know, my name is Jim Hoey. Peter Kanaris and I represent Frankenmuth Insurance Company. Yesterday you heard plaintiffs' opening statement. I am confident that you will keep an open mind until you hear all of the evidence and until you hear both

VOLUME II - PAGE 94

PAGE 95 MISSING

misrepresented, one, any material fact or circumstance concerning this insurance; or, tow, an insured's interest herein; B, there has been fraud or false swearing by an insured regarding any matter relating to this insurance or the subject thereof. Under condition 6, misrepresentation, concealment or fraud, the following is added. " No misrepresentation or breach of affirmative warranty affects our obligations under the policy unless, one, we rely on it and it is material, or it is made with intent to deceive."

Now, first let me see if I can set out for you once again the layout of the premises. And this is a diagram, Defendant's Exhibit Number 44. And I'll use this ledge here and I think I'll leave this here. And this is a site plan. It's not to scale. And we're going to say this is the north direction. We have here on the north side building 153. Here we have building 151. This is the milk house building, 154. 153 was a metal building. 151 was a two-story wooden frame old barn, old, old barn. 152 was a long, one-story barn. And the slurry tank was over here and that's where the manure was kept.

Now, in applying for the insurance, Mr. Zahran met with a person in Green Bay called a producer. His name is Louis Rush with the Kranzusch Insurance Agency. So when you buy insurance you sit down and an application is filled out and you sign it. Pictures were taken of the farm when the policy was applied for. And I have a couple of those pictures to show you so you can see what it looked like before this loss.

I have here Defendant's Exhibit Number 50A, which is a picture looking at the barn, and we're looking west. So if you can picture this. The photographer is standing over here, there's a driveway, and he'd be looking west. And you can see here this milk house here, and inside the milk house there's a big bulk tank and there's- - an office is there. And here we can see the two-story wooden frame barn, 151. Here I have

Defendant's Exhibit 50B. And this is a photo looking from the northwest looking back southeast. And you can see here building 153, the metal building which sort of wraps around building 151. So these two photos were taken before the loss.

Here I have part of the policy it's called the declaration sheet. And it has some detail about what the insurance company agrees to insure. And I hope you can see this. I'll stand a little closer in case the print is small. You see we have a farm owner's policy effective July 19, 1988. You can see the producer, Kranzusch Agency, Inc. That's who Mr. Rush worked for. Here you have Mr. or Mrs. Zahran identified. And here we have certain buildings or farm buildings, out buildings, whatever you want to call them, with the limits and premiums. And here we have 151. type 2 frame. Two-story barn, 40 by 120. Limit : $75,000. And you can see the premium charge is $372. 152. That's the reminder. This long building here. Type 1 masonry barn, number 2, 40 by 170. Limit: $100,000, premium $335. barn number 3. Type one. All metal. 60 by 160. Limit: $100,000, premium $335. I'll just go through two more of these. 154. Type one masonry, milk house and bulk tank, 20 by 26. Limit: $25,000, premium $89.

And let me drop down here to number 160. type one glass, porcelain or enamel, slurry store, 50 by 23. 50 percent construction applies. Limit: $40,000 premium $75.

So this is from the policy.

As I might have mentioned before, Frankenmuth Insurance Company is based in Michigan. They are about 80 miles north of Detroit. They have been in business I'm told long before my time. 150 years. Mr. Spalding, who is sitting at the table with us, is the property claims supervisor, and hopefully he will be with us this week and I understand that he will testify during plaintiff's case.

The loss occurs on May 24, 1989. There's no dispute about the fact that there was a windstorm. After that

occurrence, Frankenmuth has what they call staff adjustors, people that work directly for the insurance company that go out and inspect sites and adjust losses, deal with the insured, perhaps deal with contractors.

This man's name was Bill Conaway. Mr. Conaway has since retired. He retired by the end of July or early August of 1989. I understand that the plaintiff will read his deposition. His deposition was taken at his home in Michigan.

So Bill Conaway sends Mr. Zahran a letter, and the letter is dated May 26, 1989. The loss was on May 24. The letter says: We need a detailed estimate of damage or value and a cost to repair by a competent person or firm and photos.

Now, Mr. Conaway also goes to the site shortly thereafter, visits the site, takes photographs, meets with Mr. Zahran, walks around, inspects the premises. And we have some of his photographs that he took that day.

Now, why did Mr. Conaway ask for those items? As I mentioned before, the policy is a two-way street. Not only does the insurance company have obligations, but the policyholder does too. And here we have a provision from the policy called additional duties, Defendant's Exhibit Number 10. Additional duties, property coverages. The insured must also: one, take all reasonable steps to protect covered property at and after an insured loss to avoid further damage. We pay for repairs which are reasonable and necessary to protect the property from further damage, provided the insured keeps an accurate record of such expenses. These payments do not increase the limit of liability otherwise applicable to the loss.

Two. Submit to us a statement of loss under oath if requested within 60 days after the loss or accident. At our request the insured must also submit a proof of loss containing the following information.

A. Time, place and circumstances of loss.

B. The insured's interest and the interests of others in the property involved, including all mortgages and liens on the covered property.

C. Other policies of insurance that may cover the loss on the property.

D. Change it title or occupancy of the property during the policy period.

E. Available plans and specifications of buildings or structures.

F. Detailed estimates for repair of the damage.

G. An inventory of damaged personal property showing in detail the quantity, description, cost, actual cash value and the amount of loss. the insured must attach to the inventory copies of all bills, receipts and related documents that substantiate the inventory.

And then there's some other provisions relating to examination under oath, production of records, et cetera.

The policy also contains a provision relating to neglect. Defendant's Exhibit Number 9. Neglect. We do not pay for loss which results from the neglect of an insured to use all reasonable means to save and preserve covered property at and after the time of loss.

Now, I mentioned that Mr. Conaway was there after the loss. And I'd like to show you now one of the photos that he took. This is Defendant's Exhibit Number 56. And this is a view of the - - - the photographer is looking this way, looking southeast, I believe. And here you can see the deck where 153 had been. So 153 is gone. And this is the wooden deck here which is still remaining so there's still an area below that. And here you can see the north side of barn 151. And you can see some boards are missing and this is barn 151. Here is a small section of the roof right here. This is taken shortly after the windstorm.

Now, the policy contains a limit of liability for each out building. That's just a limit. Perhaps the loss is not in excess of the limit, does not reach the limit. So, nevertheless, nevertheless, Frankenmuth makes an advance payment - - without receiving any documents from Mr. Zahran, they make an advance payment of $25,000, and the check is dated July 11, 1989.

Then on July 26, Mr. Zahran sends a letter to Frankenmuth - - July 26 - - enclosing bills and estimates of the costs to repair the damages. I'm sure the letter will be in evidence. And with the letter there's a sworn statement in proof of loss. This will be Defendant's Exhibit Number 6. And, the amount of the loss claimed in the proof of loss as of July 25, 1989, signed by Mr. and Mrs. Zahran, is roughly $240,000. $240,000. And with it, there's a work sheet prepared by Mr. Zahran, list of bills for a Corn Hill Farms. And I'm not going to go through all the items on the list with you, but let me just cover some of the big items. Four cows died. $4,400. Things like bales of hay, damages to silos, roof shingles, three barns. Roof shingles, three barns. $3900. Clean -up. There's tow items pertaining to the slurry tank. The top ring of 11, 928, the second ring 11,928.

There's on barn listed, 494,339. Of course, you can see that barn 153, the metal siding has been blown away.

And then there's a listing for other barn. And the amount listed is $12, 282. And then there's a listing for demolishing and bottom, $17,800.

We don't find anything in here on barn 152, the one story barn. Now, the amount for $12,282. We have a proposal from a company called Thiede, T-H-I-E-D-E, Peninsula building Service, in that amount, $12,282. It says, repairs on existing building. Purchase and install 54 square feet of asphalt shingles on existing barn. Repair all broken roof boards and replace gutters and downspouts, approximately 200

feet. Main support beams of existing barn for roof needs to be jacked up and supported. Frame in open end of barn and cover with tin. Build and install two sliding doors on existing barn. Straighten existing wall. Repair any incidental damage found while repairing building.

What does Frankenmuth do? Remember, this came in July 26. Frankenmuth responds with a letter dated August 7, 1989. Mr. Conaway is in the throes of retirement. He gets together with Mr. Spalding, and Frankenmuth responds with a letter. August 7, 1989. Dear Robin or Karen Zahran: This letter is a follow-up to the personal visit and many phone conversations that I have had with Mr. Robin Zahran in regard to the wind loss suffered by barns, silos and farm personal equipment on the date in question. Although I am certainly aware that disputes still remain, I am confident after personally inspecting the damaged insured property and having had a further opportunity to review the various estimates which have been prepared to assist in the determination of the loss of value of the various damaged insured farm property, that I can properly pay and indemnify you for your loss at this time. To this end, I am forwarding to you various drafts made payable to yourself and the various parties at interest totalling $136,687.74. An explanation and breakdown of the payments is as follows: A total of $26,609.99 is closed for damage for various farm personal property including your cows and also including a $2,000 allowance for cleanup. Attached to this letter is a breakdown on your farm personal property damages. And we have a two-page attachment here which shows various line items such as cows, repair grain auger, repair Bobcat with amounts listed, which totals the roughly $26,600.

For your barn which is delineated as barn 153 on your policy, enclosed is a payment for $75,000 which represents the total policy limit of $100,000 on this barn minus the $25,000 advance payment that was made. So they've paid the

limit on 153. And then they talk about three silos that were damaged. Payment was made on those. Three's no dispute with those in this lawsuit. Those payments were each $5,351.66 for each silo.

I am also enclosing $14,973.77 for damages to the barn delineated as Number 151. This includes $6,473.33, allowance for the vent system. A payment for $4,000 is enclosed for barn delineated as Number 152.

As indicated above, these payments total $136,687,74. You will note that there is no proof of loss nor is there any release being required or requested for your negotiation of these drafts. It should be made, however, clear to you that this is my estimation of your total loss and damages in this claim. As a fiduciary for all insureds who entrust their premium money with us, we must observe reasonable standards of proof of damages.

We also make payment to Forest Construction Company. And I have an invoice here, Forest Construction Company, the amount is $975.63. It says, labor to straighten the brace barn, 33 hours. $22 per hour. Materials. 10 two-inch by 8-inch by 20 feet. And then it's all added up to the $975 figure.

So at this point, taking into account the advance payment, Frankenmuth has paid $161,687 roughly.

Another sworn statement in proof of loss comes in from Mr. Zahran, and it's dated September 8, 1989. And this one is in the amount of $180,564.67.

And we have a letter explaining the basis of the amount, the request for additional payment from Mr. Zahran to Mr. Spalding, dated September 8, 1989. And in the letter he says: When we submitted our proof of loss there were several items that you did not pay for, therefore, I am forwarding to you my note in addition to the proof of loss for the items that you did not pay. And in here he makes claim for the slurry

tank. And the amount claimed is $79,070. $79,000. Item 160, slurry store, limit $40,000. For 151 he makes a claim for a total loss to 151. Two-story frame barn. And you know that we've already paid some money for that for repairs. And he claims the balance due on the limit of $75,000.

We then get another letter dated September 22, 1989 from Mr. Zahran to Mr. Spalding, and the number goes up again. Now the number for additional payments are $314,492. And this letter was broken out, and I won't go through each item, but there's a pump listed here for $15,000. The pump was in the slurry store or in the slurry tank. We will show that the pump was not damaged. The manure system again is claimed for $79.070. And now, there's a claim for barn 152. Here's barn 152. The claim there is $88,120.

Now, let me show you Exhibit Number 51. This is a photo taken by Merle Brander on March 7, 1990. This is barn 152 for which the claim is made of $88,120. What does Mr. Spalding do? And I might add, the September 22, 1989 letter says from Mr. Zahran: I am at this time going to instruct my attorney to file action in the federal court for damages caused by the tornado and which you re refusing to pay, and damages that have been caused by your continuous delay.

That's one of the paragraphs in the letter.

Mr. Spalding has an open mind. He's trying to do the best job that he can. He's not closing the door. What does he do? He hires another adjuster. Mr. Conaway is retired. He contacts a gentleman by the name of Larry Mours, M-O-U-R-S. Mr. Mours is an independent insurance adjuster. In other words, he works for a private company that works for a whole group of insurance companies, and he's based there in Green Bay close to Denmark.

He calls Mr. Mours and says look into this some more. He's still claiming damages for 151, for the slurry store. I'd like you to contact some experts in the area, somebody that

knows wooden barns, somebody that know the slurry tank, and have them look at it and we'll take a second look at this darn thing.

So you don't have to e a graduate engineer to be an expert. An expert can be anyone that has experience. If you have spent your life working around wooden barns, you're an expert at it. You don't have to be a graduate engineer.

So, a gentleman by the name of Orville Krueger is contacted by Mr. Mours, and Mr. Krueger calls his business, he calls himself The Barn Doctor. So Mr. Mours and Mr. Krueger go out there and look at this barn 151.

Now, by this time there's been some work to it. And here is Defendant's Exhibit Number 51. This was taken by Mr. Brander in March. But this is looking at barn 151 from the west looking east. And you can see that it's been covered up with tin. You can see that 153 is no longer there. Exhibit 51 again is a view looking east, taken in March 1990. Here we have barn 151. Exhibit 50A, that's what it looked like before the loss.

So, Mr. Krueger goes and looks at it. They visit the site on September 20. Mr. Krueger reported that the two-story barn could be repaired. He did not see any discernible damage to the one-story warming house, barn 152. Mr. Spalding responds to Mr. Zahran again with a letter dated October 18, 1989. In this letter he states: Dear Robin or Karen Zahran, I am enclosing at this time a copy of the report and estimate as submitted by Mr. Orville Krueger pursuant to the damage to both your wood two-story barn, 151, and also as it pertains to damage to the warming barn or number 152.

As you can see in Mr. Krueger's observations, he feels that part of the damage to your barn is not wind related, and refers specifically to the situation where the barn is handing over the side wall and also leaning endways. You can see in his observations the reason he questions this. Further, you can see

where he is estimating that he can repair the wind damage to the wood two-story barn and also do some minor masonry work to the warming barn for a total of $5,264.

The remaining work for what Mr. Krueger feels is not wind damage can be completed possibly for $1,000 if all he has to do is jack one side of the barn and possibly as much as $10,000 if he has to jack the entire end of the barn and anchor it together. Although Mr. Krueger does not feel that the additional $1,000 or additional $10,000 is necessary to correct wind damage, in order to give you the benefit of the doubt I am enclosing with this correspondence a draft in the amount of $6,274 to represent the 5,274 for wind damage to both the wooden two-story barn and the warming barn and also the $1,000 that may be completely correct - - that may completely correct the other problems referred to.

Did Mr. Krueger do the work? No, he did not. Why did not Mr. Krueger do the work? The reason that I didn't fix the barn was that after I had sent the proposal to GAB or Larry Mours, Mr. Zahran called me several times a day, weekends, Sundays, whatever, and harassed me terribly. And he said you're going to fix it for six thousand some dollars and I'm going to hire you to fix the barn and them I'm going to turn around and I'm going to sue you for $600,000 and you're going to put me up a new barn. And in that conversation I said to him, Mr. Zahran, if you go into a filling station and ask for five dollars worth of gas, that doesn't necessarily mean you re gong to get a whole tankful. I will do the work that is proposed in my proposal and put that barn back in shape so that it's usable and straighten out to what you can do with that old barn. You're not going to get a new roof because he pointed out to the peak of the barn where originally these old barns had old shingles and the boards were spaced apart so the wood shingles when they get wet they can get air to dry out. And when he pointed up to the peak of the barn and said I'm going to get this

just like so that's going to fit us just so, and I was not about to tear that roof open and resheet it with all new lumber, and that is what he was asking. So after the harassment from him, I determined that he wasn't worthy of my services and why should I put up with all this harassment. So I called Larry Mours and I asked him to take me off the case and forget about it, and he said it was no problem and after that I did not hear from Zahran.

Mr. Mours had trouble finding someone to look at the slurry tank. The slurry rank was made by a company called Quonset, and was apparently built in 1986. And the company was American Structures, a fellow by the name of Wildenberg.

So, finally, Mr. Mours found a gentleman by the name of Joel Portmann to come and look at the slurry tank. And here's what the slurry tank looked like as of march 7, 1990. Again, this was a photo taken by Merle Brander, Defendant's Exhibit Number 51. See the Quonset name there. It was still in use. And Mr. Brander climbed all over that tank and he climbed up a ladder and he looked inside, and this is what it looked like on the inside. Defendant's Exhibit Number 51. so he's up over looking in and he can see a layer of snow up on the top there.

Mr. Portmann found that the tank had some problems at the top. He wasn't sure of whether or not it was wind related. It could have been an original installation problem. But, again, Frankenmuth gave the policyholder the benefit of the doubt. November 10. 1989, Mr. Spaulding sent a letter to Mr. Zahran. This letter will follow up my telephone conservation with Robin on November 9, 1989. At that time I indicated that I had received a telephone report from Mr. Mours detailing to some extent his understanding of the inspection results of the slurry tank in question as completed by Mr. Joel Portmann. I have not received Mr. Portmann's written appraisal or proposal, but will, of course, forward to you a copy once I

receive it. In the meantime, Mr. Mours has prepared a report on GAB letterhead which reflects to the best of his ability the total results of his personal discussions and conversations with Mr. Portmann. I am enclosing a copy of this report with this correspondence and as you can see, although there is some question as to causation, wind or nonwind, Mr. Portmann has estimated and proposed that he can repair the slurry tank in the amount of $14,000. Accordingly, I an enclosing a draft in the amount of $14,000 made payable to all parties of interest to be used as you see fit, but hopefully to be utilized in the repair of the slurry tank in question. Et cetera.

So, at this point Frankenmuth has made payments of roughly $183,000.

Mr. Portmann was not interested in getting involved in the dispute, was not interested in doing the work, but we believe that his proposal was valid and reasonable and provided a reasonable basis of which Frankenmuth could make payment. We don't believe that the tank was a total loss.

The lawsuit in this case was then filed on January 19, 1990 in federal court in Chicago. That's where I'm from.

After the suit was filed I made contact with merle Brander who is a structural engineer based in Green Bay, and he made an inspection of the site on March 7, 1990, climbed all over the barn with one of his assistants by the name of Patrick McCormick, climbed upon the - - well, let me go through some of the photos that he took. I think I've already gone through a number of them. Here's one that he took on March 7, 1990. Here's 152, the warming barn, here's 151. There was a total loss being claimed for 152. He climbed up on the roof of 152 and he's looking north, and you can see the roof of 152 here and you can see 151 right here. 152, the one-story barn, he climbed up in the attic, go through a hatch and climb up there, and he took a picture of the trusses up there. And this is what it looked like. Found no damage up there.

Here's a picture that he took, I think I showed you this earlier looking west, here's 151. And based on what he found he thought Frankenmuth's position was reasonable. In fact, 151 was repairable, it was not a total loss. He found that 152 had no discernible damage. He found that the slurry tank was not a total loss. And Mr. Brander will be here to share with you his findings.

Then in July of 1990, Frankenmuth is still on the risk, they're still insuring Mr. Zahran. July of 1990, there's a fire in 151.

MR. KMIEC: Your Honor, may we approach the bench in respect to this subject matter?

THE COURT: You may, counsel.

(Side bar discussion off the record.)

MR. HOEY: July 1990 there was a fire in 151. A sworn statement in proof of loss was submitted by Mr. and Mrs. Zahran, dated August 28, 1990, the amount claimed was in excess of $116,802.50. Total loss was claimed for barn 151, the limit of liability of the policy was $75,000. Frankenmuth paid to Mr. Zahran roughly $100,000 on November 1, 1990, $75,000 of which included the total limit of liability on barn 151.

In summary, it's Frankenmuth's position they handled the claim reasonably, in good faith. They did not act in bad faith. And that rather, Mr. Zahran did not keep his end of the deal; that the policy is void because he violated the policy provision relating to misrepresentation, concealment and fraud. Thank you very much.

THE COURT: The bailiff will hand out the pads and pencils, please.

(Pause.)

THE COURT: All right, Counsel, you may call your first witness.

MR. KMIEC: We call Robin Zahran to the stand, Your Honor.

THE COURT: All right, Mr. Zahran,

THE CLERK: Would you raise your right hand, please.

ROBIN ZAHRAN,

12/31/91 JURY TRIAL - CLOSING STATEMENT: DEFENDANT

We submit that this is a case about a man that simply went too far and he kept grabbing for more and more and more and more, and he violated his policy prevision. And it's up to you to send that message.

Mr. Zahran said pictures don't lie. That's right. That's why we brought all these pictures for you to look at. That's why Mr. Brander was here with his photographs. We had the Conaway photographs. Because we wanted you to see that these things that he was making clim for were in fact no damaged, that he knew that they were not damaged, and that he contrived with these other people to make claim for them. And as time went on, the claim was just escalating and escalating. so pictures don't lie; unfortunately, sometimes people do.

We brought you the signed application so that you could see for yourself that they slurry was listed as $40,000, yet the claim was $80,000. That 151, the two-story barn, had a limit of $75,000, yet he made claim for more than that.

You also say on the application 150 regular dairy cows, yet they would come here and tell you that they're entitled to lost milking profits for 230 cows which we can se was simply not the case.

We have a situation where we have a



sophisticated insured. We're not dealing with someone like yourself perhaps that's never been involved in a lawsuit or never bas been involved in an insurance claim. Mr. Zahran is an insurance broker, how knows the game, he knows insurance policies. He knows the seriousness of sworn statements in

proof of loss. He knows what it means when he put his name to it. Take it back with you to the jury room and read the print on it. He knew exactly what it meant and how serious it was. And he knew the consequences that if he misrepresented the damage, that it would void his policy.

Mr. Conaway was on the site, we read to you his deposition. You heard that he's no longer in good health and that he did his best to tell you what he did. He was at the site, he made an advance payment for 153 in July. Mr. Zahran submits the sworn statement in proof of loss in late July. And you have the August 7 letter. Frankenmuth in good faith timely responds with money of abut $136,000. They've already paid $25,000. Now, if that isn't a timely response I don't know what is

What did he claim on the slurry tank? He's not claiming the slurry tank is a total loss at that time? He simply calls up Earl Wildenberg and he gets an estimate for roughly $11,000 for one ring and then he doubles it. And he's not making a claim for 152 at that time, there's no mention about 152. And you know that Zeller had already been on the site right after the windstorm loss. Yet nothing about 152.

And Khalidi, when was Khalidi there? Who really knows when Mr. Khalidi was there? Here we have a case where Mr. Khalidi is a social friend of Mr. Zahran, he testified in his deposition under oath that he was there in June 1989, and then he changed it. Then he said December of 1989. What do you believe?

I know when you go somewhere and you think back in your memory banks about that experience, I always associate it with the whether. What was the weather like when I did that particular thing? Don't you think that Mr. Khalidi would have remembered what the weather was like when he went to the farm? I submit to you that he has no credibility and you should not believe anything that he said.

Mr. Spalding I though this morning tried to explain to you how he and Mr. Conaway worked on the claim, did the best they could. They tried to be fair. I thought they tried to give Mr. Zahran the benefit of the doubt. They responded on August 7, and then this thing just kept snowballing as Mr. Zahran grabbed for more. And comes back with the September 8th letter with the sworn statement in proof of loss. Have a look at it. Now he want another $180,645. I asked him, so as of September 8, 1989, according to the proof of loss, it was your intent that Frankenmuth should pay you an additional $180,000. Is that true? Yes, sir.

At that point he has nothing for 152. Zeller's already been there. He's making claim for $79,000 for the slurry. He knows full well that the limit is $40,000. In fact, you might remember Mr. Wildenberg built it, Mr. Wildenberg confirmed that Mr. Zahran paid $40,000 for it, that's where the limit came from.

Then Mr. Zahran talked abut the meeting in Michigan. He claimed it lasted five minutes. That's unbelievable. Wouldn't it be more reasonable that if he's going to drive to Frankenmuth he had a 30 minute meeting? I tried to share with you the notes that Mr. Spalding made at the time of the meeting. Now, that's something credible. That's before this thing is in suit. That's when people make notes and they're going to write down what happened. and I had you read - - - I had him read his notes and you had a chance to read his notes and you'll be taking those back to the jury room. Now here's Mr. Spalding trying to do a good job. He had an open mind. He said, all right, I'll hire an independent adjuster from Green Bay, Larry Mours. Let's get some more people to look at the barn, we'll get somebody to look at the slurry tank.

So Mr. Mours contacts Ovril Krueger. Now, Mr. Krueger comes in here, they say he's court tested; I find that unbelievable. Mr. Krueger said here that he had never been

in court before. did he look like the kind of guy that's been in court before, traveling round Wisconsin testifying? And then he brought to you his proposal. He stood here and explained his photographs. And he said the barn 151 was repairable. the barn was repairable. And I could do it, I was willing to do it. And then what happened? Mr. Zahran met with him at that time, called him on the phone, the phone ringing off the hook, he said if you get between me and the insurance company I'm going to hire you for $6,000 and then I'm going to sue you for $600,000.

Now, this is your chance to say, hey, this shouldn't be allowed. This is not the way business is done. It's time to put a stop to this and to say the policy is void.

What about Mr. Portmann? Mr. Portmann knows what the story is. He knows there's going to be a dispute apparently. He wants nothing to do with it. He says I don't want to be involved in litigation. That's how most people are, isn't that true? And Portmann says I'm not going to sign the report, I don't want to get involved in it. And then he says I don't want to do the repair work because Mr. Zahran wants me to guarantee the tank. And I didn't build it. But I'm willing to do the repairs for $14,000, even though it's not established that the $14,000 necessarily is from wind damage. But here's Mr. Spalding giving them the benefit of the doubt and paying him $6274 for barn 151 and paying him $14,000 for the slurry tank.

And Mours' reports are in evidence, take them with you to the jury room. There's five records. Have a look at them and see what he went through trying to find somebody who Mr. Zahran had not rubbed the wrong way that wanted to get involved in this claim.

Now, they're not done grabbing for more though. Not only do they want what's covered under the policy, but they want to get so-called lost milk profits. So Mr. Kmiec hires Mr. Quarino, who he knew from law school who

he worked before in a case, to testify abut this, and what's the best he can come up with? The best he can come up with is Frankenmuth should have hired Merle Brander sooner. that's about all he can say. That was his only complaint about the claim file. We should have hired Brander sooner.

Well, put yourself in Mr. Spalding's position. He's got a responsibility at work to his policyholders, and he said I have estimates from Krueger and I have the Portmann findings and I'll give him the benefit of the doubt, I'll make the payment, I don't need an engineer to go look at this right now.

And then they talk abut this appraisal issue. I submit that's a red herring. There's an appraisal provision in the policy, and you can look it up, let's see if I can find the page here, it's on page 13.

(Reading) If either makes a written demand for appraisal, we will select a competent independent appraiser, et cetera.

There is no letter from Mr. Zahran saying I demand appraisal under the policy. All there was was just a reference to name your appraiser, I'll name my appraiser, but there was never a letter sent by Mr. Zahran saying pursuant to the policy provisions I demand appraisal under the policy. As Mr. Spalding said, if there hd been he would have made the appropriate response. And if you look at Mr. Spalding's letters, I think there's four of them in October and November of 1989, you'll see that he makes reference to that in one of his letters.

Professor Luening. I think here's the guy that knows farm management. You know, he gets hired, he's paid by the hour, he's going to render an opinion. What happens? He comes up with one opinion where he says that the lost milking profits are $78,000. That's following a meeting with Mr. McConcille and Mrs. Zahran, but that's not enough. They have to grab for more. So what happens? Mr. Zahran calls him the night before his deposition and talks - - works him over for

an hour over the phone. That's not enough. We've gotta increase that part of the claim. Bring it up to 230 cows and then I'll inflate my number even higher.

Mr. Luening said that from a farm management point of view based on the milk receipts, on average there was less than 100 cows and milk before the windstorm. Then he said that the actual 1990 revenues are only $19,000 less than 1989. And not only do they try to influence his data, but they don't give him all the facts. They only tell him about the payment that Frankenmuth made for the fire in July of 1990, but they don't tell him about the $183,000 that Frankenmuth paid in 1989, andhe said that would have a bearing on his opinion.

Then they claim, well, perhaps there's some consequential property damage becasue we didn't get 153 rebuilt and I'm going to make a claim for the stanchions of roughly $50,000. Mr. Zahran said that. But then if you look in the early documents with the sworn statement in proof of loss, the amount claimed for the stanchions is $10,500 not $50,000.

Then we get to the pump. Grabbing for more. The pump is first made reference to in the September 22, 1989 letter. Never mentioned up to that point. And then all of the sudden September 22, 1989, $15,000, he makes a claim for it. He admits it wasn't damaged. Then they claim they dropped the claim. It's not dropped anywhere. You don't find any letters where he dropped that part of the claim. It's another misrepresentation which we submit voids the policy.

Mr. Zeller, he was just a salesman. He sold buildings. He did an estimate in September of 1989. He's not an engineer. Unbelievably, he got up here ondirect examination and tried to make some assertions about what had to be replaced, but thank God our Constitution provides for cross-examination, because he admitted under cross-examination that 152 did not have to be replaced, yet that ywas in his proposal to replace 152 whether it needed it or not. Mr. Zahran knew that

152 was not damaged. How about 151? He identified only a couple of spots where there was damage in 151. One header beam had shifted over time. He mentioned a vertical beam at the door that appeared to be twisted. He admitted undedr cross-examination he didn't know if that was due to wind.

I've already talked about Mr. Khalidi. That's the kind of thing you should not put up with. This man didn't have any photos, he didn't have any report, who knew what to believe>

Then we have a fire in 151, in July of 1990. Mr. Zahran said he made a claim for the limit. When asked if Frankenmuth paid it you might remember that he first denied it. I showed them the check, the check is in evidence. It's dated October 31, 1990, it's in the amount of $75,000, Mr. Zahran endorsed it. Yet, his attorneys beleive that he's entitled to more money on 151. We submit that the answer is no.

I thought that the testinmony of Merle Brander was compelling. Here's a man that came here with his report. I welcome you to study his report, it's not very long. He came here with his photographs. He told you about some wind damage that he did see. He showed you the wind damage that he did see in barn 151 as of March 1990.

You might remembet that he showed the one storm brace and he said that the north wall was kicked out three to four inches. Well, that was repairable. That's what Mr. Krueger's estimate was about. But Zahran did not want to work with Mr. Krueger, because he wanted a show place, he wanted a new barn no matter what.

The special veredict form will have a series of questions. Question number one will be, did the Zahran's violate the policy provision relating to the misrepresentation, concealment or fraud by willfully concealing any material fact or circumstance concerning thier insurance claims? We submit

that the answer is yes. If you answer yes, that's as far as you have to go.

Question number two. Are the plaintiffs entitiled to monies under the insurnace policy as a result of the windstorm? We sumbit that the answer is no, that we paid them everything that they are entitled to and that payment was made on a timely basis. There's a break-out here for 151. the evidence is clear as to what we paid for 151. We submit that we don't owe them any more money.

152. you've seen the pictures. 152 is not damged, does not have to be repaired. The milk house and bulk tank, 151 as it's identified on the policy, there's no damage there. The slurry tank, we paid them $14,000. They haven't even effected any repairs to th slurry tank. There's no evidence that it's not being used or that it has to be replaced. And farm personal property. We broke that out for you in the August 7, 1989 letter, its' itemized with the inventory sheet, and we beleive that we paid them everything that they're entitled to.

There's a question about bad faith, did Frankenmuth act in bad faith. And the judge will give you an instruction as to what constitutes bad faith. Did the insurance company act reasonably, did they act recklessly, et cetra. Adn we submit that Frankenmuth did the best job they could. they acted reasonably, promptly, fairly, and that they're not liable for bad faith in this case.

We also aubmit that no monies should be awarded for punishment to deter Frankenmuth. I can't imagine what Frankenmuth did in this case that consitituted evil or was malicious. I think you got a chance to take the maeasure of the man when Mr. Spalding was on the stand. He's been in the insurnace business a long time. He tried to be fair, he tried to do the best job that he could.

In conclusion, ladies and gentlemen, we submit that Mr. Zahran just went too far, he violated the policy

provision, the policy is void and that you should answer the first question yes.

The way the court rules are, I don't have another opportunity to talk to you. I don't know if Judge Curran will let Mr. McConville talk to you again, or not, but once again, Mr. Kanaris and I and Mr. Spalding would like to thank each of you for listening to our side of the case. Thank you very much.

THE COURT: Counsel, you have five minutes.

MR. McCONVILLE: Thank you, Your Honor

## REBUTTAL CLOSING STATEMENT

MR. McCONVILLE: There was no testimony that Mr. Zahran or Mrs. Zahran committed any fraud or misrepresentation. Nobody told you that. There was no testimony.

The prior proofs of losses in which Mr. Zahran did not get paid for he told you that he resubmitted them on subsequent proofs of losses. If he didn't get paid on the first proof of loss, he took that item and stuck it on the second proof of loss and said pay it; you didn't pay it the first time, pay it now. That's not a misrepresentation, that's not fraud.

No one from Frankenmuth told you that they overpaid Zahrans based on misrepresentation, did they? That's what you have to find before you can answer yes to that question.

MR. HOEY: Objection, Your Honor, that misstates the law.

THE COURT: Members of the jury, the court will instruct you as to the law that's applicable in this case. Proceed, Counsel.

MR. McCONVILLE: Thank you, Your Honor. Pay particular attention to that instruction. That instruction will tell you words along those lines.

If I can, I've got two more minutes. This is a bad faith claim. The bad faith here is this. And when you're instructed you'll be told this. In answering bad faith you may consider whether the Zahrans' claim was properly investigated and whether the results of the investigation were given a reasonable evaluation and review. That is, if they don't properly investigate the claim, they've committed bad faith.

Mr. Tillisch said it's like treating this as if this were your own home. Well, let's think about that for a second. You consider this as your own home. Guy by the name of the house doctor comes over, raps on your door and says I can fix this house for you, I'm going to put some bolts on it and we're going to shift it and put it all together. And then he doesn't stand behind his report? Portmann doesn't stand behind his report? Neither of them do. What does Mours tell you? Their own adjuster, their own adjuster said it had little or no value. That means their investigation at that point is zero. They need to go out - - Mours even said that, they need to go out and get another gut to say that it needed to be repaired. At that point replacement is still valid. That's what bad faith is all about. They did not do that. Mours told you they needed an engineer to support Portmann and Krueger. They didn't have that. That's bad faith. And you'll be able to consider that on the verdict. You'll see it right over question one, put down "no" and answer question number two "yes." And question number two is the bad faith question. The damages. You're going to have to mull through them a little bit. They're tough. Lot of conflicting testimony. but pursuant to Mr. Kmiec's argument, I think you'll find your way through that.

Thank you very much, and have a happy holiday season.

THE COURT: Members of the jury, these are a little lengthy instructions, so why don't you stand for a moment and we'll give you a chance to stretch before we start on those.

12/23/91 JURY TRIAL - CLOSING STATEMENT: PLAINTIFF

## CLOSING STATEMENT

MR. KMIEC: Ladies and gentlemen of the jury, I guess I really didn't expect to argue today and I'm kind of in a disarray, but I suppose you've noticed there's been a little of that during the course of the trial in any event, so many items to cover in a case such as this.

Let me thank you , and I hop we can get out of here before Christmas.

Frankenmuth Insurance Company inspected and labeled the buildings and all of the farm items. Their agent did that before the insurance policy was issued, and that's Exhibit Number 1, Plaintiff's Exhibit Number 1. So, you can review that if you need to. The reason I tell you that is that Frankenmuth knew what they were insuring. And so then, of course, we had the storm on May 24th. The adjuster went out a couple days, Conaway that is, and he took some photographs, ran around the place with Mr. Zahran and he inspected the property.

Now, Mr. Conaway according to the testimony and the evidence promised to send an engineer out to inspect that slurry tank because an issue developed kind of early on that. That was never done.

As to barn number 151, Conaway observed - - he concluded that the east wall posts, the top of the east wall foundation moved eastward and the east wall of the second floor moved out abut six or seven inches.

If you recall Mr. Zahran indicated that he and Conaway had a discussion about trying to get a 60-foot boom in there, and the only one that was available I guess was a 40-footer to get in there to reach the top of barn 151 in order to be

able to do something with it. And that never occurred. That just simply dropped like a hot potato.

Now, Conaway, of course, was the one that hired Forest Construction, and they came out there with a come-along, which is a wench type of thing, and cables and that type of thing, and tried to pull the barn 151 back into place. Okay? And we contend that they didn't do that very well. And by the same token those were meant to be temporary repairs.

Pat Harlan, the supervisor again in the claim file, agrees with that, okay, that those repairs were simply meant to be temporary. For instance, Forest Construction, Mr. Nimmer, you'll notice in the file, he gave a quote for replacing barn 153, but he didn't give a quote for repairing barn number 151. And that was - the repairs there were simply meant to be temporary.

Now, the items, there are some personal items that were pointed out after the first proof -- well, after the first proof of loss. Mr. Zahran - - this may help you later because we've got so many items that are involved here and that type of thing. What I did is I blew up Plaintiff's Exhibit Number 2, page 92A. And this then shows the items that were paid on 8/7/89. So those items are not in issue. And you can just look through that.

The first one, for instance, is the ventilation system at 22 whatever that is, 851, I believe. And then you've heard the testimony that there was a second proof of loss and itemization of damages. That second one covered these items that weren't paid, it does not cover these that were paid. Okay? And , for instance, you'll see this ventilation system right here. See? They paid 6473 at this point out of that figure of 22,851, and it left that balance of 16,000, you see.

So, if you kind of follow these it's going to give you the picture of how things transpired. These figures in here, this 40,000 limit for 153, those are Frankenmuth's these large

ones. Well, you see that Frankenmuth note and this also Frankenmuth note.

Okay. And then the last figure is going - - the last item that was submitted, and this is really the figure that we're concerned with in terms of the overall damage that wasn't paid or underpaid.

Then we get into this conveyer. The conveyer is the same thing. At one time it's called the conveyer, another time it's called an elevator. See that elevator? That's the one that there was a price decrease on that from 4,000 to 46. And that's the record.

So, that's the one that there's an argument about how extensively it was damaged, and Robin Zahran indicated that he had junked it, he had left the two people take it, you know, and that type of thing, and he's never been paid for that.

And then these tandem running gears, he had been paid for a -- wagons, they settled on wagons. In the first proof of loss it was $5,000 for wagons. Two wagon boxes. There's a claim for 6,000, okay. These are just the boxes 6,000, they paid 4,000, okay?

And so this here, the tandem running gears are the wheels and the frame under those boxes, okay? And so, that figure is in there for $4200 for both boxes. That's never been claimed before, except it might have been - - it's claimed here, okay? He had a figure of $3200 that he could have brought it from a Tony Morreshik (ph) who went out of business, 3200, he would up paying 4200 for it from Gruetts and there's a bill in the claims file for the 4200.

The diesel tank again we indicated they paid for the underground tank, they didn't pay for the above-ground tank, okay? And there's a picture of a diesel tank and the prices are on there, okay? And with the exhibits. And then we have the cows that were unpaid. They paid for four cows initially, and then there were three other cows that were lost up to this

date, 3300. There was testimony that there were two more cows subsequently lost.

The statement from the vet, okay, is in the claims file substantiating that loss. so this loss, it's #1100 a cow is what we're estimating. So this loss, it's $1100 a cow is what we're estimating. So that's up to 5500 with the additional testimony.

Now, that pump for $15,000 as we mentioned, that's the one that fell into the pit, into the manure rather, they thought it didn't work and then they got it fixed and then the claim was withdrawn, okay, for that one. And there's a note in the claim file by the insurance company, is that, - - Earl Wildenberg told them that the one in the pit itself was okay and the one here is the one that fell into the manure.

So, and then we go into the value of the manure. It's going to cost 79,000 to replace it. Okay. We say, hey, if they claim there's a dispute s to whether or not the balance over $40,000 was covered under personal property, okay, as personal property, because he had only 40,000 on the specific coverage. You'll see that on what we call the declaration sheet in the insurance policy. Look at page 2 to 3 or something like that, okay? And it sets out all these numbers, okay, of 151, 42, et cetera.

So, you have an option if you, of course, feel that it should be replaced and the 14.000 was inadequate, to award that difference. It would be either 26,000 or else if you feel part of it is covered as personal property, award the entire amount as 14,000.

Now, the barns here are mixed up by Frankenmuth, okay? Just remember when you see the big figures, 151 is really 152 vice versa. All right.

So, now, and we're contending that barn number 152, at least $76,950 for lifting that roof, repairing the blocks, and Khalidi had testified that the rods were bent, and there's

nobody outside of Brander that doesn't say -- well, I forget exactly what Brander said. I guess he said there were some cracks in the blocks. But everybody else agrees that there was damage around all of the windows.

And that photograph, that wonderful photograph that Brander showed you where he climbed into the barn and took a picture of the rafters, that barn was just built a couple years ago. If you climb into the rafters it's going to look great. But the thing is the whole roof shifted. It moved east. That's what I was virtually arguing with Mr. Spalding about that. This whole darn roof shifted. Okay? It was a question about how far it shifted. There's no alternative. You gotta pick the roof up and you gotta redo it. And this was Zeller's estimate for 152. That was Zeller.

Now, 151, of course, was the one that was so much in controversy, the middle barn here. And we claim and everybody indicates it was twisted, it was off foundation. All you gotta do is look at the photograph after it was twisted back by Forest Construction and you can see the hole in the wall - - I'm sorry, the hole in the ceiling right there.

Page 8, picture number 2. That's after they -- that's after Nimmer was there, okay, twisting it around the stuff, right? This picture was taken by Conaway. Gave that to Zahran as he did a number of these pictures. I'm totally stymied why Mr. Brander when he testified, why he didn't refer to any of these photographs, you know. They were taken just a couple days after the windstorm. He kept referring to his photographs that were taken on March -- in March of '90, okay, when he had those available to him. The insurance company, of course, had those in their own file, that type of thing.

Okay. In any event, we feel that he's entitled to the entire coverage of 75,000. Now, you may think and Zeller gave an estimate on what it would cost to replace that building. Mr. Zahran testified that it cost him over $180,000 in '83 and

into '84 to redo this building. He spent , $100,000 was his figure, to remodel and to restructure this building, okay? It was so important to him, if you recall, because he knew what he was going to be doing. The next thing he did almost contemporaneously with this repair was to add on this building, okay, 152. So, this building was in great shape, in spite of what Brander might say.

So, replacing it for 65,000 plus, I think it was 65, it was 78,000 was the figure. Okay. And then to cap the concrete, electrical costs and that type of thing. So Zeller I think was at 65 plus the additions. In any event, we're well over the $75,000 limits on that one. And I think you should award that. And I think you should consider not deducting that 14,000 that was paid to Mr. Zahran, you know from the 75,000. You, of course, can do what you like in that respect, but the facts is that he had to use that money to temporarily put protection around this barn, okay, for that winter. That caused so darn many problems, you know, as we'll talk a little later about the consequential damages. So I think you should – I would ask you to award him the entire 75,000 on that.

Then the barn that there is some dispute about coverage, well, it didn't make any sense to me. They don't know whether they're covering it or not, and they don't know if they're covering it under 151 or 154, but there's no question that Mr. Zeller gave us an estimate on here of 25,500 to redo this barn. He gave you all the reasons for that. And the total claim is twenty-seven five, but he coverage is 25. Okay? so you would – those are the limits of his coverage. I would ask you to give him the 25 on that.

We got quite a total there, but we've got quite a substantial operation, and the figures are there.

Now, I don't particularly want to be repetitious, but on 151. The cabling operation in an attempt to do

something with the building was unsuccessful. Frankenmuth admits that. The photographs prove that up.

Zeller indicates it's gotta be repaired. Khalidi, you remember Khalidi, he indicates there's structural damage there. You can't attach -- you can't build a new barn and attach it to that. Brander said its okay. As long as you kind of keep them separate it's not going to make much difference. You know. So I don't know, I like to think that you're convinced that 151 -- he should have gotten the total coverage so he could have replaced that barn.

Dr. Krueger, you remember him, he got up, he practically fell in the jury box I think, and he was their time-tested court expert. He didn't have to be asked questions. I like to think of him as a part of the team. He was in court, he was hired because, as Mours said and as we pointed out, he's good in court, he's had success.

So, my contention is he really wasn't hired to do an evaluation here, a legitimate one; he was hired really in the middle of the claims investigation is what he was hired, and he really told them what they wanted. but even given that, if you took a look at his estimate, he's got more rods and bolts and plates, you know, to kind of stretch this thing back and pull it together. As Khalidi said, you can't do that with wood. The wood is blown in one direction, now you're pulling it back in another direction. And it's just not going to be the same barn. You're going to have just too many problems in the future. And as Mr. Spalding indicated at page 44 of Exhibit 2, he's going to have to have it adjusted again or inspected and that type of thing, because after the cable towing and bracing the roof structure apparently now doesn't fit.

Any evidence or argument in reference to that 151 shouldn't be covered because it was poorly constructed or there was one rotten beam or it was dilapidated or something, Conaway said. We take issue with those contentions to begin

with, okay. The barn was in excellent condition. But giving the devil its due, it doesn't matter. The fact is that they insured that barn for $75,000. You don't come in and tell somebody, well, the wind wouldn't have done this or something or another had the barn been in some sort of super-duper condition and consequently we're not responsible, you are responsible. They inspected the barn, okay? They issued the coverage after they looked at the barn. All right? So they take it as it is.

Now, the same thing applies to number 152. If you recall Krueger. Well, there are no expansion joints or pilasters in these wall, allowing for the walls to expand and stuff such as that. It doesn't matter. The fact is if they're saying the building was defective, so what? The facts is that it's covered and the wind damaged it. Okay? I mean, they saw it before. Nobody tried to defraud them or anything such as that about what they're covering. Okay? And it's one heck of a time to be saying, well, you know, it didn't have this or that and consequently for some reason we're not going to pay.

Such things as, you know, again getting back to 151, there was reliance upon Thiede's estimate by Mr. Spalding, that that was the reason how they got ultimately to 14,000. I'm here to tell you that that $14,000 figure was just pure speculation. How they jumped from twelve-five to 14 is beyond me. And then to deduct the fan out of there yet and not pay him for that was a travesty.

But, even if Thiede's estimate of 12,800-and-some dollars, that didn't even consider doing with this what it was before. Okay? Before, this barn was connected to this barn. It was all contiguous. It was one -- it was one area. All right? And to say that, well, we're going to put a sheet -- we're going to put some metal over here for you and cover that end and that takes care of you, that puts you back to where you were, well, that isn't fair. The fact is the way it was is the was it is now, or as you see it there, and the way it should be. And

any modifications in terms of repairs shouldn't be the basis for using , you know, a figure that somebody gives you to repair.

Again, the central theme here, we tried to point that out to you in our opening statement and when Robin Zahran was on the stand, when you take the roofs off this, this is one operation. The whole thing is one operation. And it's gotta flow that way. Without that, you know, you're going to -- you don't have what you had, okay, and you don't have the type of business plan that he ad there in operating a very up-to-date dairy farm.

Now, the hour is late and I'm trying to run through this. Now, the -- at page 45-1 of Exhibit 2, our claim file again, this is a discussion with Earl Wildenberg and Mr. Spalding. They 're talking about the fact that the tank may have to be replaced. You know? He knows that. And they really did nothing, nothing effectively, okay, to look into it and do a good job of evaluating it. They didn't get an engineer in there, as I mentioned to you before, until after the lawsuit was started.

Excuse me a half a second.

(Pause.)

MR. KMIEC: Now I can't find what I'm looking for. Thank you.

In addition to those losses, okay, I don't have a blow-up like that for these items, but they've been testified to and I'd like to ask you to consider these items. There was a milk loss on the day of the storm, okay? And that's been testified to in the amount of $797.55. The electricity went out if you recall and they lost milk. The silo pipe and door. I don't believe that's on here. They never paid for that. Do you recall that was a $398 item? The cows went from three to five. And there were 2,000 bales of hay at $1.50 rather than 2.50 for a total of $3,000.

Now, the other thing is that we went to great pains to show what happened because of the disaster of the winter coming on, you know. And the fact that he had to decrease his herd, do you remember, for a couple months there, the heifers that he had prior to the tornado, they were able to come back and so, therefore, they were able to produce more milk. And then they were selling some cows so they had more income there for the first couple of months after the storm. But then gradually because they couldn't house the cows -- the amount of cows that they had before and those that they planned on having increasing the herd. And if you recall that figure was that $183,370. Okay? That was the figure that Professor Luening took all the pains to come up with. And he's got credentials all over the place. If he tells you that's what he lost, okay, that's what he lost. The question before you, of course, is whether or not it was because of Frankenmuth's conduct in denying claims or underpaying the claims, particularly building number 151.

Some of the things that are so glaring and I think you should look at is the fact that this appraisal process, okay? This darn thing -- and this is the area you're going to be asked -- I mean, the special verdict is going to ask in addition to the damages that I've been talking abut already whether or not Frankenmuth's conduct was in bad faith and whether it was in reckless disregard of the rights of Robin and Karen Zahran. Okay. And if you find that, yes, their conduct was, then you're going to be able to make an award of punitive damages to penalize an insurance company for not paying legitimate claims. It's an area that I think you should consider seriously.

When you do consider that area, if you feel that their conduct was unreasonable, if you feel that their conduct was in reckless indifference or disregard of Robin and Karen's rights, okay, then I think you should really consider penalizing them because, you know, when you do that, believe me, in a

case such as this don't think of yourself as a jury sitting here on the 23rd of December in Milwaukee county and nobody's going to hear you, and that this doesn't make any difference. Believe me, it will make a lot of difference. These cases, there's a lot of attention paid to these kind of cases, okay? If you think that their conduct was as I've indicated, okay, and that type of thing, and you penalize them, a lot of people are going to hear about this. It's going to be heard no just in Wisconsin. These cases get published and that type of thing, get written up, and you can bet your life that somebody in California is going to read about it if there's something significant that comes out of this, and somebody in New York as well.

So, these are very important cases because they help a whole lot of other people. Now, we're submitted annual statements with the court for -- in terms of the financial worth of Frankenmuth Insurance Company, and I believe you'll be able to refer to those. And that may give you some idea as to what to do if you feel that they should be penalized, because their wealth has quite a bit to do with the amount of any potential penalty.

In concluding, I don't want to get particularly melodramatic, but, you know, Frankenmuth was from my perspective pretty ruthless in this case. And the approach , and it's a defense team approach. You can tell from the people they put on. You put on a Mike Tilleisch who came here from Florida, and God knows what they paid him to come down here to really say nothing. What did he tell you? You know, he was on that stand for I think about 10 or 15 minutes and off and that was it. And the only thing he told you was that I hired him once five years ago. That's about it.

And that's supposed to make some sort of an impression with you. The fact is that all he did was to get up there and tell you that, well, I don't think their conduct was in bad faith. You can decide that. You're in a position-- you

heard the testimony. Some of it was a little disjointed, I apologize for that. Didn't come in as clear sometimes as it should. Sometimes if we're pressed for time or something we couldn't put it in as smooth as we'd like to and often we did it repetitiously I might add.

But, and that applies uniformly to the whole defense team here. Brander was just something else again. To bring Brander on, you know, after a lawsuit is started, not to have hired him to begin with, that's utter nonsense. If they would have hired him to begin with, we had Khalidi, the two of them would have got together, they would have got another guy and the whole thing would have been resolved. We wouldn't have to be here. Believe me, Robin didn't want to be here in court. He wanted to get the buildings back together and up and get that farm, that dairy business operating before winter set in, and he could have done it.

And the, you know, the other thing is to turn around and to viciously attack Robin Zahran and Karen I think is just way out of place. They're calling them a fraud; that he misrepresented. Well, if filing a claim and trying to get what you got coming and to try to get, you know, the value that you think you should be getting is wrong, if you can't argue with your insurance company about what you got coming, well, that's utter nonsense, you know, without being called a fraud.

So, I think personally that Robin Zahran was -- you know, he put on a pretty strong type of personality and that type of thing, I know that, but you can see that he was frightened for his future. I mean, that family, they really had their finances on the line. They were really having a tough time of it and I think they're very fortunate that they pulled out of it. And I don't think insurance companies should be allowed to bargain with their insureds. You pay the claim. You don't' say, okay, you want 100,000,

12/24/91 JURY TRIAL

PROCEEDINGS

(Outside the presence of the jury.)

THE COURT: Let the record reflect that all counsel are present.

Counsel, you indicated that you wanted to put something on the record prior to the jury returning with its verdict?

MR. KMIEC: Yes, Your Honor. During the conference with your law clerk, Mr. McConville appeared and he objected to question number one that is on the special verdict. So I'd like to just be sure that that's a part of the record.

And from a practical standpoint at this time, in that the jury has the special verdict in their possession, I would ask that the court modify question number one at least to this extent. I would ask that the court put it as the last question the special verdict. Alternatively, to strike the second paragraph which is that "If the answer to the preceding question was yes you need not answer any of the following questions; if the answer was no, please answer the following question," I would ask the court to strike that. And we've accommodated the defendants in their request to strike the question number 5B after the verdict was in the jury's possession, so they've



opened the door on that and I think it would be appropriate -- I mean, at least I think that give us the precedent to do that in terms of that paragraph.

I had indicated to the court as a preliminary matter, of course, that we had requested that question number 1 be eliminated in totality on the basis that there was absolutely no evidence in this record that would support the inclusion of

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are that are submitted. Thank yo

THE COURT: Mr Hoey?

MR. HOEY: Your Honor, we set up the violation of the misrepresentation concealment of fraud provision in our answer in counterclaim filed a long time ago. We believe that if that provision was violated by the insureds, that that's the end of the analysis; that one need not go further. And what can I say? It's in the special verdict form. The instructions were specially tailored to this verdict form. The jury has been instructed and they're now deliberating.

THE COURT: Well, as you know, counsel, this is the first time that this objection has been brought to the court's attention. I don't quarrel at all with the fact that you may have discussed it with the law clerk, but I was not made aware of it at our conferences on Monday or any of our subsequent meetings.

I'm concerned about, first of all, the timeliness of the objection. And I apprecaite you had a lot of other things on your minds yesterday when the speail verdict form was given

to you, but it's a little bit hard for me to understand how you could have argued the case to the jury with the special verdict in hand and not recognized the objection.

Be that as it may, it does seem to me that question number one is a threshold question. In other words, if the jury were to find from the evidence that the plaintiffs did violate the policy provisions regarding misrepresentation, concealment or fraud, then it would seem that that on the basis of the contract of insurance would make the answers to the other questions meaningless. I grant you, Counsel, as I have said in other situations with this case, I don't think the evidence is very compelling, but certainly I can't agree that there wasn't any evidence as to misrepresentation or fraud. I think Mr. Zahran's testimony certainly would tend to lend some support to that.

Counsel brought out that he was a sophisticated person with experience in the insurance field generally and, thereofre, would be perhaps more knowledgeable of matters of this kind than the average insured.

I am uncomfortable with the second part of your request in which you ask that the instructions that follow question number one be delineated and that the jury be instructed to disregard those instructions. It would seem to me that now we are approximately two hours into their deliberations, that I would guess they're pas question number one already. Now I may be wrong.

MR. KMIEC: I hope you're right.

THE COURT: I can appreciate your concern and it does raise some interesting legal questions in this particular type of case. But I really don't feel that there is any better way of approaching the matter at this stage than to allow the verdict to continue on as it is in the form that it is and trust to the competency of our jury system. they may correct our mistakes.

MR. KMIEC: Your Honor, just in terms of -- and I understand that I assume the court has tentatively ruled at least on our request. It's a new area of law, there isn't much case law on it, and we may be in a position to -- you know, to set some standards in respect to those kind of issues. It just doesn't make sense to me that you void legitimate claims because of some alleged misrepresentation. The question --

THE COURT: I think the theory, Counsel, on that is that courts have held that there is no other way of preventing people from making false claims if there is no penalty associated with it. In other words, why not inflate your loss because the worst that coan happen is that they're going to cut you down.

Well, our courts have held that there's got to be some way of prohibiting this practice, and one of the ways that they have permitted is the provisions in a policy which causes the policy to be voided if there are such fradulent misrepresentations as to material facts. And I think the instructions clearly distinguish between somebody who merely overvalued his loss as opposed to somebody who surreptitiously or otherwise attempted to conceal the true value and the true los. I thnk the only way that we could have a viable insurance industry today would be if that type of procedure and that provision were honored.

I think on the other hand the greatest safeguard from the insured's standpoint is the jurors I think have a tendency to excuse those acts if there is evidence - - or excuse - - at least in those cases that we're tried here that's been by experience that they have done a pretty good job of excusinginsureds.

MR. KMIEC: I think that area of law isn't defined as well as it could be, and my perspective is that is somebody represents as to an item that isn't particularly significant that it shouldn't be punitive in nature and then he

can't collect on a substantial item. We don't know what the jury's thinking is in a question such as this. Okay?

They may find that, well, he submitted a proof of loss where he submitted a claim based upon an estimate for the entire slurry tank, okay, but the coverage is only 10,000, but he shouldn't have done that somehow. He should have been 76, and I know my coverage is 10, so pay me the 10 or something such as that I suppose. But, my gosh, everybody I'm sure would sumbit an estimage, okay, for the insurance carrier is sophisticated enough to be able to make --

THE COURT: But the instructions clearly distinguish those acts from the type of act that constitute a vasis for voiding the policy.

MR. KMIEC: See, I'd like to see the law defined in terms of what items were misrepresented. And if they were misrepresented, then that itme should be stricken from the claim. That I can appreciate. But not to somehow go back and wipe out even claims that were paid. They're seeking reimbursement for the $182,000 if the jury answers that questin yes. That's been their stated position to me.

THE COURT: Well, if there is support for that the court would be glad to look at it, but I would strongly question in the manner in which these checks were tendered that there would be a basis for that, Counsel.

MR. KMIEC: I guess, as I mentioned to the court on the phone, I hate to see incomplete verdicts especially in long trials. If we had the entire verdict completed then we'd simply have issues of law left folowing that, but at least we'd know about the how the jury felt about the facts!

THE COURT: The part of the instruction that I was referring to, Counsel, it says an exaggerationof the value as a mere opinion, a mere misstatement based upon an erroneous estimate of value, an honest mistake, an innocent overvaluation

lack the essential elements of fraud and do not operate to void the policy.

In other words, not only must it be a material matter, representation, but it also has to be more than just an exaggeration.

In this day and age of advertising and other fields where exaggeration seems to be the commonplace rather than the exception, I think jurors probably tolerate exaggeration better than they might otherwise a generation ago.

MR. KMIEC: I hate to belabor this, but assuming the jury answers that fquestion yes that he misrepresented, okay, there's nothing on the verdict indicating at what point in time he misrepresented. How do you handle that? We're going to be arguing about that after the verdict, and we're going to be guessing. We're going to be guessing as to what item was it, at what time.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

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ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs,

Case No. 95-C-0334

vs.

GERALD S. SCHMIDT, JR.,
ROBERT C. BURRELL,
MARIAN R. KMIEC, and
CHRISTOPHER S. McCONVILLE and all
atttorneys of law,
and ABC(s) INSURANCE COMPANIES,
Third Party Defendants,

ROBIN ZAHRAN and KAREN ZAHRAN
Plaintiffs,

Case No. 95-C-1281
Plaintiffs demand trial by jury

vs.

LARRY MOURS, PAT VICKERS,
ORVILLE KRUEGER, MERLE BRANDER
ROBERT SPALDING, MICHAEL TILLISCH,
JOEL PRTMAN, KATHRYN RASMUSSEN,
REGINALD BASMUSSEN, LEO HARRIS,
JEAN HARRIS, and the
MANITOWOC COUTY SHERIFF DEPART.
of MANITOWOC, WIS. and other
named defendants,
Defendants.

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**PLAINTIFFS' MOTION TO CONSOLIDATE CASE NUMBERS 95-C-334 and 95-C-1281**

NOW COMES Plaintiffs, Robin Zahran and Karen Zahran, appearing pro se and in their behalf, and pursuant to Rule 42 of the Federal Rules of Civil Procedure moves this Honorable Court to consolidate the cause of actions entitled ROBIN ZAHRAN and KAREN ZAHRAN V. GERALD G. SCHMIDT, JR., et al. no. 95-C-0334, and ROBIN ZAHRAN and KAREN ZAHRAN V. LARRY MORS, et al. No. 95-C-1281. In support of the Motion to consolidate, Plaintiffs, Robin Zahran and Karen Zahran states as follows:

AFFIDAVIT OF JERRY ZELLER

The undersiged being duly sworn deposes and says:

(1) That I am an employee of Morton bukldings Inc.

(2) That Pet Harmon of Frankenmuth Insurance Company contracted me in 1990, and employed myself and Morton Buildings to render him an opinion and to confirm damages to the property of Robin and Karen Zahran.

(3) That Frankenmuth paid monies to Morton Buildings for me perfrom that service for them.

(4) That at no time was myself and Morton Bukldings hired or have been contracted by Robin Zahran or Karen Zahran to represent them in adjusting or rendering an opinion regarding a fire loss.

(5) That my approval of the damages caused by the fire were not an approval by me to bring the property to the pervious condition, as I could not dso.

(6) That in June, 1992 sometime, Robin Zahran stated that Frankenmuth alleged that Jerry Zeller and Morton Buildings were Zahran's contractors.

(7) That in Juen, 1992, I was contracted by Robin Zarhan questioning me about the accuracy of him hiring me as his contractor in that fire loss.

(8) That on July 9th, 1992, I called Robin Zahran and the office of the attorney for Frankenmuth Insurance Company to clear up any false statements and put Frnakenmuth and its' attorneys

straight that myself and Morton Building were hired by Frankenmuth Insurance Company.

(9) That the attorney for Frankenmuth refused to come to the phone at that time.

(10) that Robin Zahran spoke to the attorney's secretary of the fact the statements were false, and that Morton Building was not the contractor for Robin Zahran in the phone conversation of July 9th, 1992.

_____
Jerry Zeller (signed)

Dated July 13, 1992
Subscribed and Sworn to
before me this ____(13th)
day of July, 1992.

_____
Notary Public (Karen Carpenter)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN and KAREN ZAHRAN
Plaintiffs

No. 90 C 337

v.

FRANKENMUTH MUTUAL INS. CO.

Judge Thomas J. Curran

Defendant

**DEFENDANT'S TRIAL MEMORANDUM**

This is an action against the Defendant insurance company to recover under an insurance policy for damages allegedly sustained as a result of a windstorm occurring on May 24, 1989. Plaintiffs allege breach of contract, breach of good faith and breach of an Illinois statute. The insurer has asserted four affirmative defenses: neglect, failure to take reasonable steps to protect the insured property subsequent to a loss, fraud and limitation of liability pursuant to the policy. The insurer also counter claimed against the Plaintiffs for misrepresentation, concealment or fraud.

**Factual Background of the Action**

On August 5, 1988, the Defendant insurance company (hereinafter 'FRANEKNMUTH'), issued a farmowners' policy

of insurance to ROBIN and KAREN ZAHRAN (hereinafter "Plaintiffs"), to insure certain property located at 18422 Rosecrans, Denmark, Wisconsin, known as "Acorn Hill Farms" (hereinafter, the "Farm"). The policy, No. FR 0423155, was effective from July 19, 1988 to July 19, 1989 and insured the farm subject to enumerate limitations on each structure.

On or about May 24, 1989, while the policy was in full force and effect, a windstorm damaged certain of Plaintiffs' property insured under this policy. On July 25, 1989, Plaintiffs submitted a Sworn Statement in Proof of Loss claiming damage of $240,300.37. On September 8, 1989, Plaintiffs claimed an additional $180,564.67. Most of the Plaintiffs' itemised claims were at or above the policy limit for that structure. Specifically at issue in this case is Barn No. 151, for which Plaintiffs claimed wind damages "in excess of $75,000," the policy limit.

FRANKENMUTH visited the site of the loss and thoroughly inspected the damage. The loss was adjusted and FRANKENMUTH paid Plaintiffs $182,888.37, which included $22,223.40 for Barn No. 151 Plaintiffs cashed the check and subsequently filed this suit. No substantive repairs were made

to Barn 151. Very little of the money FRANKENMUTH paid was used to repair the Barn.

On March 18, 1990 a chimney fire damaged residence of the farm. An inspection was conducted, and FRANKENMUTH paid Plaintiffs' $3,000 pursuant to Plaintiffs' repair estimate.

On July 8, 1990, a fire occurred on the Farm causing further damage. FRANKENMUTH again visited the site of the loss and thoroughly inspected the damage, Once again, many of the Plaintiffs' claims were at or in excess of the policy limits for each structure. Barn No. 151, the structure in which the fire originated, was a total loss. FRANKENMUTH adjusted the loss and a check was issued to Plaintiffs. FRANKENMUTH paid the policy limit, $75,000, for barn 151. Again, the check was cashed and suit was filed against FRANKENMUTH seeking more money. That case is now before this Court and is a separate action.

**FRANKENMUT'S AFFIRMATIVE DEFENSE AND COUNTERCLAIM**

FRANKENMUTH asserts an affirmative defense in this case based upon the subsequent fire loss to Barn No. 151. This

affirmative defense asserts that any damages that may be awarded against FRANKENMUTH be reduced or diminished by the subsequent $75,000 payment made to Plaintiffs for the total loss by fire to Barn No. 151.

Furthermore, FRANKENMUTH filed a counterclaim against Plaintiffs alleging that Plaintiffs have made excessive claims, misrepresented or concealed material facts and fraudulently and falsely swore regarding those claims. The policy, by its own terms, is void if the insureds is found guilty of misrepresentation, concealment, or fraud, and Plaintiffs would be liable to FRANKENMUTH for all sums previously paid by FRANKENMUTH to Plaintiffs.

## POINTS AND AUTHORITIES FOR THE COUNTERCLAIM AND AFFIRMATIVE DEFENSE

### 1. The Subsequent Total Loss from Fire Affirmative Defense

An insured may not collect the policy limits for a total loss two times during the policy period absent total repair or replacement of the insured property between the events. It is

logically inconsistent to award the insured successive total losses without requiring repair or replacement of the "lost" property. To hold otherwise is tantamount to doubling the value of the policy without raising the premium, a consequence not intended by either of the parties. To hold otherwise would allow Plaintiffs to profit from the windstorm claim and subsequent fire.

a. Any Further Damages for the Wind Loss Should Be Offset

Several English Common Law courts have denied the insured recovery where a covered partial loss damages property which is later totally lost due to an uninsured event before repair from the partial loss. Livie v. Janson, 12 East. 648 (K.B. 1810); Brisish & Foreign Ins. Co. Ltd. v. Wilson Shipping Co., Ltd., ! A.C. 188 (H.L. 1921)

If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured byhits having been antecedently damaged?

12 East. at 654. That court reasoned that the first loss was "immaterial" because of the subsequent loss. Id. Unrepaired partial damage is, in effect, erased by the "total loss." SCAC Transport (USA), Inc. v. Atlantic Mutual Ins. Co., 652 F. supp. 1091, 1094 (S.D.N.Y. 1987) The SCAC decision followed the English Common Law finding that the insured may not recover for unrepaired partial damage caused by a covered risk where subsequent uninsured total loss destroys the property. Id.

**b. Plaintiffs' Attempted Double Recovery**

It follows that Plaintiffs could not have two total losses on the same structure without complete repair or replacement after the first loss and before the second loss. FRANKENMUTH paid Plaintiffs to repair the damage sustained in the windstorm. However, Plaintiffs contend that Barn No. 151 was a total loss which could not be repaired for the amount of money FRANKENMUTH paid. Due to the subsequent total loss of the barn, the partial loss is "erased," having merged into the total loss.

If the first event was a total loss as Plaintiffs contend, then the barn had no value at the time of the fire since Plaintiffs did not effect a total repair or replacement. Not surprisingly, Plaintiffs claimed the barn was a total loss after the fire. FRRNAKENMUTH paid the policy limit. In Kupfersmith v. Delaware Ins. Co., 86 A. 399 (N.J. 1913), the court awarded the insured only nominal damages for the second of two losses because the insured had vacated the structure after the first loss and could not prove that the building had any value. Id. at 400.

Where no financial or pecuniary loss has been sustained by virtue of an event, there can be no recovery. Edlin v. Security Ins. Co., 160 F. Supp. 487 (S.D. IL 1957) It logically follows, contrary to Plaintiffs' contentions, that one could only have one total loss without repairing or replacing the "lost" property.

Other Courts have held that the insured is entitled to recover the total of the insurance policy once. In two cases, the insured property sustained a parital loss and subsequent total loss, which were both covered under the policy. In Ezra Trull v. The Roxbury Mutual Fire Ins. Co., 57 Mass 263 (1849), the

insured had completed repair of the partial loss before the property was totally destroyed. That court held, as did the court in Crobmie v. Portsmouth Mutual Fire Ins. Co., 26 N.H. 389 (1853), that the insured could recover up to the total of the policy only once, regardless of the number of occurrences.

**c. Double Recovery Is Unjust Enrichment and Contrary to Public Policy**

It is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. Hartford Accident & Indemnity Co. v. Chung, et al., 1981 F. Cas. 1337 (1981). Where two insurance policies were maintained on the same property which was lost to fire, the insured is not entitled to total loss recovery on both policies. Id.

Plaintiffs would be unjustly enriched if permitted a full recovery for the wind loss because that very same property was subsequently lost to fire. Following Plaintiffs' logic, if the wind loss was a total destruction under the policy, he had nothing to lose from the fire. Therefore, even if Plaintiffs could prove that the barn was a total loss from the windstorm, they were fully compensated for the loss after the fire. In that case, the

$22,000 payment on the wind loss would be due and owing to FRANKENMUTH since Plaintiffs would be unjustly enriched.

signed by James Hoey

Clausen Miller

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs, Case No. 90 C 337

v.

FRANKENMUTH MUTUAL INS.CO.

Defendant.

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR A NEW TRIAL OR, ALTERNATIVELY, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

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INTRODUCTION

A jury trial was held in the aforementioned case on December 16, 1991. Both parties rested on December 23, 1991. The verdict went to the jury in the from attached to ChristopherA. McConville's affidavit as Exhibit "A".

On December 24, 1991, the defendant, Frankenmuth Insurance Company, requested that the verdict be modified to exclude Question Number 5(b). At said time, the plaintiffs reiterated their objections to special verdict Question Number 1 and requested the court to withdraw said question or modify the

question in accordance with the law. The court granted defendant's motion to modify Question Number 5(b). However, the court denied plaintiffs' motion.

At or about 2:30 p.m. on December 26, 1991, the jury concluded its deliberations and answered "yes" to Question Number 1 of the special verdict, thereby precluding any further answers to the remaining questions on said verdict. This brief is in support of plaintiffs' motion for a new trial on the issue of misrepresentation, bad faith and breach of contract or, in the alternative, for judgement notwithstanding the verdict changing the answer of special verdict Question Number 1 from "yes" to "no" and adding "yes" to Question Numbers 2, 4, and 6 and amounts to the remaining damage questions to be added in accordance with evidence at trial.

## ARGUMENT

### I. STANDARDS REGARDING THE APPROPRIATENESS OF A NEW TRIAL OR ALTERNATIVELY, JUDGMENT NOTWITHSTANDING THE VERDICT.

The court has the inherent right to set aside the jury verdict and order a new trial if it believes a fair trial has not

been achieved. St Clair v. Pipal, 611 F. Supp. 911, 915 (E.D. Wis. 1985); Fort Howard Paper Co., v. Standard Havens, Inc., 119 F.R.D. 397, 407 (E.D. Wis. 1988); and Valbert v. Pass, 866 F. 2d 237 (7th Cor. 1989) In disposing of the motion for new trial in this regard, the district court must decide if the trial was unfair to the moving party. 866 F. 2d at 237.

Furthermore, the trial can grant a new trial on the ground that the jury verdict is contrary to the clear weight of evidence adduced at trial. 611 F. Supp. at 915. As a matter of law, the court must find that the record does not contain sufficient factual foundation to vitiate the jury verdict. 611 F. Supp. at 914. (Emphasis added).

The court must decide if the verdict is against the weight of the evidence in desposing of a motion for a new trial. 866 F. 2d at 237. In weighing the evidence, however, the court need not view it in the light most favorable to the non-moving party. Smith v. Trasworld Drilling Co., 773 F. 2d 610, 613 (5th Cir. 1985). Moreover, if the verdict is contrary to the law and the evidence, or evidence was admitted or excluded improperly during the course of the trial, thereby prejudicing the moving

party['s rights to a fair trial, the motion for a new trial is proper. Pool v. Leone, 374 F. 2d 961, 962 (19th Cir. 1967) and Peterson v. Calmar Steamship Corp., 296 F. Supp. 8, 12 (E.D. Penn. 1969)

Lastly, where there is not substantial evidence to support the verdict, judgment notwithstanding the verdict is appropriate. Allen and O'Hara, Inc. v. Barrett Wrecking, Inc., 898 F. 2d 512, 514 (7th Cir. 1990). These aforementioned grounds for a new trial and judgement notwithstanding the verdict will be ap0plied to the remaining substantive arguments within the brief.

II. DTHERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A VERDICT ON MISREPRESNETATION. THEREFORE, A NEW TRIAL IS APPROPRIATE.

A. **Defendant failed to establish the necessary elements of misrepresentation.**

The elements of misrepresentation include the following: existence of a representation of fact must be made; such representation was untrue; said untrue representation was made knowing that the representation was untrue or recklessly without caring whether it was true or false; representation was

made with the intent to deceive; and induce the party to act upon it to a party['s damage. Wis. Civil Jury Instruction 3100 and Wis. Civil Jury Instruction 2400 is modified by Tempelis v. Aetna Casualty and Surety Co., 164 Wis. 2d 17, _27 N.W. 2d __, __(1991). At this juncture it is important to note that the plaintiffs do not concede that reliance is not a necessary element as referenced within the Tempelis case. That is, some amount of reliance is necessary in regards to the materiality element of fraud as stated within Nolden v. Jutual Benefit Life Ins. Co., 80 Wis. 2d 353, 360, 259 N.W. 2d 75 (1977) and Northwestern Nat'l Ins. Co. v. Nemetz, 135 Wis. 2d 245, 262, 400 N.W. 2d 33 (1986)

From the evidence presented at trial by the defendant, Frankenmuth, it is obvious that they fell short in their burden of proof on misrepresentation except for one element. There is no doubt that the plaintiff made representations of fact to Frankenmuth in regards to the May 24, 1988 loss. However, there is insufficient evidence in the record to support the remaining elements of the defendant's counterclaim for misrepresentation.

Frankenmuth failed to present evidence that any of the plaintiffs' claims were untrue and made by the Zahrans knowing the representations to be untrue or recklessly without caring whether it was true or false. The Zahrans fully complied with Frankenmuth's request to provide Proof of Losses and estimates verifying the loss amounts. These representations are true. Likewise, the representations in the form of estimates were produced from other sources and were true. Therefore the plaintiffs put forth truthful representations and truthfully relied upon others in assessing damage to their farm. The defendants put on no evidence which would indicate otherwise.

All Frankenmuth did at trial was to rebut damage amounts and the extent of damage through experts. these experts were utilized to suit the defendant's needs and their unilateral assessment of the damage. This in itself, does not constitute misrepresentation.

More importantly, Frankenmuth failed to put on one iota of evidence indicating that the plaintiffs intentionally deceived Frankenmuth's pecuniary damage. (Emphasis added). It is well established law in the State of Wisconsin that in order

to establish misrepresentation, there must be intent to mislead the insurance company and to induce the insurer to act to its detriment. Fink v. La Cross Mut'l Fire Ins. Co., 203 Wis. 350, 357, 234 N.W. 339 (1931) Conflicting and controversial evaluations of an insured's property and amount of insurance declared in a Proof of Loss are not justifications for misrepresentation. In fact, conflicting and controversial evaluations of property and their amounts supported a jury[s finding that insureds were not guilty of false swearing that would have voided their fire insurance policy in Great Southwest Fire Ins. Co., v. S.M.A., Inc. 474 A. 2d 950, 953-54, 59 Md. App. 136 (1984). Even despite an insurer's contention that an insured's inventories of dood damaged were speculative, this did not constitute fraud absent proof of insured's intent to defraud. Deitsch Testiles, Inc. v. N.Y. Properties Ins. 62 N.Y. 2d 999,468 N.E. 2d 669, 670 (1984)

Frankenmuth presented no evidence that the plaintiffs intentionally misrepresented their claims. At best, at trial it was shown that there were some conflicting evaluations as to the extent of property damage and the amount thereto. However,

due to the extent and complexity of the damage to the plaintiffs' farm business, expert evaluations were necessary and naturally conflicted to some degree. The need for expert evaluation was even supported by the defendant's own adjusting company, by Larry Mours. However, conflicting evaluations do not rise to the level of intend necessary for the finding of misrepresentation. Frankenmuth fell far short of any evidence presented on the element of intentionally deception. Likewise, Frankenmuth did not put any evidence on at the trial that the alleged intentional deceptions induced Frankenmuth to act upon the statements to its pecuniary damage.

Lastly, Frankenmuth is estopped from asserting any misrepresentations in regards to the Proof of Losses filed by the Zahrans. Equitable estoppel is present if "action or non-action on the part of one against whom the estoppel is asserted which induces reliance thereon by another, either in the form of action or non-action to his detriment." Worthington v. Farmer's Inns. Exchange, 77 Wis. 2d 508, 515, 253 N.W. 2d 76 (1977). This same theory of equitable estoppel was applied in Omaha Paper

Stock Co., v. California Union Ins. Co., 262 N.W. 2d 175, 200 Neb. 31 (1978).

The court in Omaha stated that when an insurance company is in possession of rights secured by contract and does something inconsistent with the existence of those rights or with their intention to rely upon it, an insurance company is precluded from afterwards claiming anything by reason of it. 262 N.W. 2d at 180. The court in Omaha ruled that the defendant-insurance company was estopped from utilizing the defense of material misrepresentation due to the fact that the insurance company made no attempt to examine the remains of the insured property to ascertain the amount of said damage. 262 N.S. 2d at 180.

The Omaha facts are analogous to the case at bar. This is, Frankenmuth has been estopped from asserting any material misrepresentations regarding the Proofs of Loss because Frankenmuth failed to have an expert engineer ascertain the amount and the extent of damage at the Zahran farm. Frankenmuth had ample opportunity to dispute the Zahrans[ claim based upon expert engineering evaluations. However,

Frankenmuth failed to accomplish same. Instead, Frankenmuth relied upon the Zahrans to supply "expert evaluations" in assessing the loss. Therefore, Frankenmuth has been estopped from asserting misrepresentations based upon the Zahrans' evaluations due to the fact that Frankenmuth failed to involve its own experts until after litigation was commenced.

Moreover, Frankenmuth should be precluded from utilizing the plaintiffs' Proof of Losses when they in fact disputed the contents of those Proof of Losses all along. It has been hold that when an insurer is not influenced in anyway by Proofs of Loss and rejected the Proofs of Loss in total or in part, the insurer is not prejudice by same and, therefore, misrepresentation must fail. 262 N.W. 2d at 179-80. Based upon its own inadequate investigation or failure to put forth an investigation, Frankenmuth simply requested the plaintiffs' Proofs of Loss in total and some in part. Particularly, Frankenmuth rejected the Zahrans' claim for total loss of barn 151, 152 and the slurry tank. By these rejections, the insurance company is not influenced in anyway by said claims. This is, Frankenmuth was not induced to act upon these Proofs of Loss

but instead by its choice decided to reject same. As stated above, this does not rise to the level of misrepresentation nor was any evidence presented at trial in this regard.

Moreover, Frankenmuth failed to show materiality in the use of the proofs of loss. Therefore, the use of the Proof of Loss for fraud is incongruous because the element of materiality has not been met.

Summarily, Frankenmuth failed to produce virtually any evidence in regards to the elements of misrepresentation. Likewise, Frankenmuth is estopped from asserting misrepresentations based upon the Proofs of Loss submitted by the Zahrans for the foregoing reasons. As such, the plaintiffs respectfully request a new trial on the issue of misrepresentation.

**B. Overvaluation of the amount and extent of damage does not constitute fraud by the Zahrans.**

It has been long established law in the State of Wisconsin that an overvaluation of the property claimed does not in itself constitute fraud. Said overvaluation must be false and such false statement must be made with the intent to deceive the insurer. Stebane Nash Co., v. Capbellsport Mut'l

Ins. Co., 27 Wis. 2d 112, 124-25, 133 N.W. 2d 737 (1964); and, Juneau Store Co. v. Badger Mut'l Fire Ins. Co., 216 Wis. 342, 350, 257 N.W. 144 (1934).

It is anticipated that the defendant will made the argument that the plaintiffs overvalued the extent and the amount of their damages. However, without conceding that the plaintiffs overvalued their claim, assuming arguendo, said argument is not sufficient in the finding for misrepresentation. As stated to the jury in the jury instruction on misrepresentation, "an exaggeration of value as mere opinion, a mere misstatement based upon an erroneous estimate of value, an honest mistake, an innocent overvaluation lacks the essential element of fraud and does not operate to void the policy." Other courts have held that comments of exaggeration and valued judgments will be made in regards to amounts claimed on insurance policy. However, this will not establish false swearing. Yates v. State Farm Fire and Casualty Co. 417 F. 2d 767 (5th Cir. 1969) The same is true of the fact that even though a reasonable value of property is less than submitted in a Proof of Loss, said difference does not itself constitute

misrepresentation. Royal College Shop v. Northern Ins. Co. of New York, 895 F. 2dn 670, 672 (10th Cir. 1990)

It may have come out in trial that certain, amounts on properties were subject to overvaluation. However, most, if not all evaluations, were relied upon by the plaintiffs through third party estimates. Furthermore, the remainder of said claims were based upon the plaintiffs own knowledge as to the value of these items less some amount of depreciation. This in itself does not constitute misrepresentation.

Furthermore, the fact that an insured submits a certain dollar amount and later reduced that amount or eliminates the claim completely does not in itself constitute fraud.. Bohn v. Louisiana Farm Bureau Mut'l Ins. Co., 482 So. 2d 843, 853-54 (La App. 2 Cir. 1986) and G.U. Rybiski and Co. v. Louisiana Coastal Underwriters of Autobahn Ins. Co., 369 S. 2d 1097, 1100 (La App. 1 Cir. 1979)

It is anticipated that the defendants will make this argument that they offered evidence showing that the plaintiff made a claim for a manure tank pump and then withdrew said

claim and, therefore, a finding of misrepresentation was appropriate.

However, ample evidence was put on the record in support of the proposition that the plaintiffs, after later discovering the pump in the manure and finding that said pump eventually worked after certain repairs, the Zahrans withdrew said claim as evidence by lack of the claim in their final Proof of Loss dated September 23, 1989. Therefore, a reduction or withdraw of a claim by the plaintiff does not in itself constitutemisrepresentation. For the foregoing reasons, overvaluation and /or reduction in a claim does not constitute fraud entitling the defendant to judgment on the verdict for misrepresentation.

C. Plaintiffs did not receive a fair trial and, therefore, the court has the inherent right to set aside the jury verdict and order a new trial.

Just prior to the close of the parties cases in chief, there was a conference held between the court's clerk and counsel for the respective parties on December 20, 1991 regarding the special verdict and jury instructions. At said conference,

plaintiffs objected to the inclusion of the question on misrepresentation both on the basis of form and on the basis that the defendant failed to put forth adequate evidence on said issue. Immediately upon plaintiffs' objection, defense counsel for Frankenmuth vigorously argued that there was more than ample evidence in the record to support the question on misrepresentation. (See Affidavit of Christopher A. McConville).

Then, on December 24, 1991, after the defendant requested the removal of Question 5(b) of the special verdict, the defendant left the door open to modify the special verdict and, as such plaintiffs' counsel reiterated its arguments in regards to the first question on the verdict for misrepresentation. These objections included the following: lack of evidence in support of said claim; the form of the claim which should have gone to separate items insured; and, the fact that jury should not be precluded from answering the bad faith questions regardless of its answer as to misrepresentation.

Fraud on one portion of an insurance contract does not void other valid portions of the insurance contract. Johnson v.

Southstate Ins. Co., 341 S.E. 2d 793, 794 (S.C. 1986). Johnson was a case in which the court held that fraud concerning the contents of a dwelling was properly voided, however, recovery was not defeated on the dwelling in living expenses because fraud did not effect these items. 341 S.E. 2d at 794. The rational is a forfeitures of insurance contracts in total are not favored. This is in keeping with the court's language in Tempelis which stated that wholesale of voidance of a policy works a substantial hardship on insurers. 164 Wis. 2d at 28.

It was plaintiffs' argument that the defendant would be hard pressed to identify any specific item in which the plaintiff had committed fraud. Assuming arguendo, separate questions in regards to misrepresentations on the items under the insurance policy should have been set forth within the special verdict. Essentially, this is the same treatment which was given the plaintiff in their claims for bad faith. the jury should not have been mislead to believe that an overvaluation on one items would void the whole policy. This is inconsistent with the

recognition by Wisconsin that said circumstance works a substantial hardship on insureds like the Zahrans.

Likewise, the jury should have been given the opportunity to consider the issue of bad faith and breach of contract. The jury may well have concluded fraud on one item and/or concluded that Frankenmuth was estopped from asserting fraud and then found bad faith. However, the jury was never provided this opportunity. As such, this failure created an unfair and unjust result for the Zahrans.

Furthermore, plaintiffs counsel also posited the argument that if misrepresentation were found, the court, on motions after verdict, would be hard pressed to find items within the contract to void the insurance contract. This is mainly due to the nature of claims already having been paid by the insurance company in the estimated value of $182,000.00. The court had indicated that it certainly would not order the plaintiff to refund sums that were paid voluntarily by the insurance company. Nevertheless, an insurmountable hurdle of establishing an equitable time frame and items within the insurance contract to void is not being imposed by an

incomplete jury verdict. As such, an unfair result has occurred to the detriment of the plaintiffs, therefore, requiring a new trial.

Secondly, plaintiffs did not receive a fair trial in the court's decision to allow evidence and references to Frankenmuth's payment on the fire loss which occurred on July 6, 1990. The court had previously denied the defendant's motion to consolidate claims of the plaintiffs on the wind loss and the fire loss. However, at trial, the court allowed testimony in regards to claims paid by Frankenmuth on the fire loss claim. The unexpected ruling at trial was prejudicial to the plaintiffs. This submission into evidence at the very least, left the inference to the jury that the plaintiffs were making unlawful claims on property in which they were already paid due to the fire loss. The jury could have concluded that the plaintiffs were intentionally making claims that had been reimbursed.

The court also excluded evidence in reference to a $25,000.00 offer that Mr. Spaulding was considering making to the Zahrans through Larry Mours of GAB. It is this type of low ball, generalized and unspecified potential payment that reflects directly on the insurance company's bad faith conduct. That is,

this evidence shows that Frankenmuth intentionally attempted to put forth unfair claims settlement practices in resolving the Zahrans' claim for bad faith rather than discussing specific claims. A refusal to allow said evidence on the record works a substantial injustice to the plaintiffs for a fair trial.

Lastly, although the court has a fair amount of discretion in its ability to maintain the court calendar, the court, after the onset of the trial, limited each party to nine hours of testimony which would included the case in chief, both direct and cross examination. Rebuttal testimony had not been mentioned. This time limitation worked an extreme injustice and hardship upon the plaintiffs in such a complex and multiple claim bad faith case. In addition, the plaintiffs were precluded from putting on any rebuttal testimony. The court precluded plaintiffs from putting on testimony the insurance company's defenses as well as testimony rebutting the counterclaim of misrepresentation. For the foregoing reasons, the plaintiffs respectfully request the court to order a new trial on the issues of bad faith, breach of contract, misrepresentation and punitive damages.

III. ALTERNATIVELY, JUDGMENT NOTWITHSTANDING THE VERDICT IS APPROPRIATE

ON THE ISSUE OF MISREPRESENTATION, BREACH OF CONTRACT AND BAD FAITH.

Where there is not substantial evidence to support the verdict, judgment notwithstanding the verdict is appropriate. Allen and O'Hara, Inc. v. Barrett Wrecking, Inc., 898 F. 2d 512, 515 (7th Cir. 1990) As stated previously, the defendant has failed to put forth evidence in regards to the elements of fraud to support the verdict of misrepresentation. Frankenmuth falls far short of providing substantial evidence in support of this verdict, much less any evidence in that regard. As such, Question N. 1 in the special verdict should read "no" instead of "yes".

Plaintiffs also respectfully request the court to enter judgment notwithstanding the verdict on the issues of breach of contract and bad faith. The plaintiffs put forth substantial evidence showing that Frankenmuth had breached its contract of insurance and committed bad faith in their failure to put forth an adequate investigation of their claim for the wind loss. More particularly, Larry Mours of GAB, an adjuster hired by Frankenmuth, indicated in his opinion that an expert engineer

was necessary at the onset of this claim to properly evaluate the plaintiffs' loss. An expert was not hired by Frankenmuth even after the insistence of Larry Mours.

The cross-examination of Mr. Spaulding conclusively showed he had no basis for the payment of $14,000.00 made on August 7, 1989 over the name of the retired adjuster. He, in fact transferred $4,000.00 from building 151 to 152.

Therefore, the plaintiffs respectfully request the court to find for the plaintiffs in a judgment notwithstanding the verdict on the issues of breach of contract and bad faith and award damages according to proof provided at trial.

## CONCLUSION

For the foregoing reasons, plaintiffs respectfully request the court or order a new trial on the issues of misrepresentation, breach of contract and bad faith or, in the alternative, judgment notwithstanding the verdict.

Dated this 6th day of January, 1991.

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